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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 364 01

THE UNITED STATES, PETITIONER,

vs.

ANDERSON, CLAYTON & CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 31, 1954

CERTIORARI GRANTED FEBRUARY 7, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 504

THE UNITED STATES, PETITIONER,

vs.

ANDERSON, CLAYTON & CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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1 In The United States Court of Claims

No. 626-52

ANDERSON, CLAYTON & CO., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed December 30, 1952

To the Honorable Chief Justice and the Associate Justices of the Court of Claims of the United States:

1. The Plaintiff, Anderson, Clayton & Co., is a corporation organized on December 31, 1929, and existing under the statutes of the State of Delaware, with its principal business office at Houston, Texas.

2. Upon the organization of Anderson, Clayton & Co. in 1929 the corporation issued $25,842,375 of its 6½ per cent preferred and 53,312½ shares of its common stock, the capital value of which was fixed at $1 per share, in exchange for 34,875 shares of the Texas joint stock association, also known as Anderson, Clayton & Co., and thereafter dissolved. On or about April 21, 1930 an additional 47,687½ shares of common were sold at $1 a share to the
2 managing officials of the corporation resulting in the following total common stock ownership by the chief managing officials:

W. L. Clayton	44,800
M. D. Anderson	31,000
Lamar Fleming, Jr.	12,000
Harmon Whittington	5,000
D. B. Cannafax	2,750
L. L. Fleming	2,500
6 Minor Officials	1,950
	100,000

3. The capitalization of the corporation, i.e. $25,842,375 of first preferred stock and $100,000 in common stock, was expressly designed to have existing values represented by preferred stocks and to utilize the 100,000 shares of $1 common to adjust the participation of the managing officials in future earnings above the contracted return on first preferred.

4. The ownership of the common stock was surrounded with restrictions which were designed to insure its holding and use as a

method of rewarding management. From the beginning it was understood by the common stockholders, all of whom were active in the business, that the stock was not salable outside the managing directors of the business, and that even within that group the disposition was to be made in accordance with the responsibilities of and contributions to management by the different executives as determined by the holders of at least 75 per cent of the common stock. It was understood that no stockholder was entitled to sell his stock and none could keep it unless the others wanted him to. It was likewise understood from the beginning that the respective
3 interests in the common stock would be adjusted among the managerial group as responsibility changed.

5. On February 14, 1931, an agreement in writing was entered into between corporation and the holders of all its common stock, all of whom were actively engaged in the business. This instrument embodied, among other things, the provisions of the general understanding theretofore existing among the common stockholders with reference to the restrictions upon the holding of the stock and the plan for its use as a method of rewarding management. The agreement provided, in substance, that:

(1) All the common stockholders of corporation agreed to endorse their common stock to Monroe D. Anderson as trustee for a period of 10 years.

(2) The stockholders retained the right to vote their stock.

(3) The stockholders agreed that they could not assign, transfer, or otherwise dispose of their common stock without the written consent of the holders of 75 per cent of the stock.

(4) On the death of any party to the agreement, corporation agreed to purchase the common stock of the deceased party at the value determined as of July 31, immediately preceding the death, according to the provisions made in the contract for the annual determination of value by the executive committee of corporation, but in no event less than $1 per share, plus 6 per cent interest from such date to the date of death.

(5) A consolidated balance sheet for corporation and all its subsidiaries was to be prepared as of July 31 of each year (the
4 end of its fiscal year); and, in addition, for the private use of the individual parties to the agreement, a supplementary balance sheet, adjusted on account of appreciation and depreciation of the value of properties held by corporation and its subsidiaries so as to reflect the the true net worth of corporation (without any allowance for good will), was also to be prepared and approved by the executive committee of corporation as soon after the end of each fiscal year as practicable. The value of the common stock as shown in the supplementary balance sheet was to be fixed as the value of that stock for purposes of the contract.

(6) The owners of 75 per cent of the common stock could at any time in writing request any party to the agreement to sell all or any part of his common stock to corporation, or to such person as they might designate, upon terms agreeable to seller and buyer; and if seller and buyer could not agree, then according to the value fixed for the common stock in the annual supplementary balance sheet approved by the executive committee, as in the case of the death of any party to the contract.

(7) Any owner of common stock held by the trustee under the agreement could elect at any time to withdraw and sell his common stock to corporation upon terms mutually agreeable by giving written notice of his desire to the trustee. If corporation and the party could not agree upon the selling price, then the value fixed in the annual supplementary balance sheet was to be used, substantially in the same way as in the case of death of a party.

5 (8) No dividends could be paid on common stock so long as corporation was indebted in any sum whatever, nor in any event if the dividend would have the effect of lowering the book value of the stock below five million dollars as reflected in the consolidated balance sheet of corporation, nor unless an amount of preferred stock equal to the dividend was retired at the same time.

(9) Any common stock purchased by corporation under the terms of the agreement could be sold to the remaining parties to the agreement or to any other person whom the owners of 75 per cent of the remaining stock might designate in writing.

(10) Any future holder of common stock could become a party to the agreement merely by signing it or giving his consent to its provisions in writing.

(11) All the parties to the agreement agreed that any common stock thereafter acquired by any of them, in whatever manner, should automatically be subject to all the terms of the agreement and should be endorsed to the trustee.

(12) The agreement could be amended, altered, revised, or canceled at any time by an instrument in writing signed by the owners of 75 per cent or more of the common stock.

6. Until the year ending July 31, 1937 the contract value of the common stock was, by authorization and declaration of dividends thereon in second preferred stock, maintained at approximately $1 a share, such course having been abandoned when the

6 Commissioner sought to tax such stock dividends.

7. From time to time also as junior officials assumed more responsibilities and duties, shares of common stock were in pursuance of said agreement and in the ordinary course of business transferred by W. L. Clayton and M. D. Anderson to junior management officials so that upon his death M. D. Anderson held only 18,574 shares of the 31,000 originally issued to him.

8. All of the transfers of the corporation's common stock were made only to persons who occupied positions of managerial responsibility in the business and at the value determined under the agreement.

9. During its fiscal year ending July 31, 1944, Anderson, Clayton & Co. allocated and sold 6,500 shares of its common stock to the managing officials shown at the contracted valuation of $112.68 a share in recognition of increased responsibility and duties:

Names	Shares	Price
H. Whittington	2,000	$225,360.00
Sydnor Oden	1,250	140,850.00
W. H. Koar	1,500	169,020.00
J. M. Johnson	1,250	140,850.00
W. E. Parry	500	56,340.00
Total	6,500	$732,420.00

10. Of the officials to whom the corporation transferred 6,500 shares of the 18,574 purchased from the Estate of M. D. Anderson, Harmon Whittington was the vice-president in charge of trading policies and cotton merchandising activities; W. H. Koar, a vice-president in charge of the New York office and of relations with New York banks; Sydnor Oden, a vice-president in charge of cotton export sales; J. M. Johnson, a vice-president in charge of new plant and industrial activities; and W. E. Parry, the controller and chief accounting officer of the business.

11. The 6,500 shares of stock so allocated and sold was a part of the 18,574 shares acquired by the corporation on December 15, 1939, from the Estate of M. D. Anderson at its contracted valuation of $50.79 per share.

12. The difference between the amount of $330,136 paid the Estate of M. D. Anderson for 6,500 shares at $50.79 a share, its value at the time of the death of M. D. Anderson, in 1939, and $732,420, the price at which such stock was transferred to the managing employees mentioned in 1944 at $122.68 a share was credited by plaintiff to capital surplus and no income was reported for income tax purposes.

13. Following examination, the Commissioner of Internal Revenue determined that Anderson, Clayton & Co. realized a long-term capital gain in the amount of $402,285.00 on which the tax was $100,571.25 and with other adjustments determined a deficiency of $89,337.66, which was paid on August 27, 1947.

14. Claim for Refund in the amount of $100,571.25 was filed by plaintiff on or about October 18, 1947.

15. On or about January 20, 1951, plaintiff received by registered

mail an official notice, dated January 18, 1951, of disallowance of its claim of October 18, 1947.

16. All of the transactions of plaintiff in its common stock were related to its management, and to the proper compensation of managing officers from earnings, transfers were at contractual
8 rather than market values, and no transaction amounted to dealing in its own shares as it might those of another corporation.

17. The defendant wrongfully and illegally refuses to refund, repay, or credit to plaintiff (as provided in Sections 322, 729 and 3770 of the Internal Revenue Code) the amount of $100,571.25 or any part thereof and has rejected plaintiff's claim therefor, and it is of such wrongful and illegal action that plaintiff herein complains.

18. Plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

19. Plaintiff is the sole and absolute owner of the claim here presented; no transfer or assignment of said claim or any part thereof has been made; and plaintiff is justly entitled to the amounts claimed herein from the United States after allowing all just credits and offsets.

Plaintiff therefore prays for judgment in its favor against the United States of America for the sum of $100,571.25 representing the overpayment of income taxes for the period ending July 31, 1944, wrongfully and illegally withheld by defendant, plus interest as required by law, and for such other and further relief as to this Honorable Court seem just and proper.

JOHN C. WHITE,
838 Transportation Bldg.,
Washington 6, D. C.,
Attorney for Plaintiff.

9-10 *Duly sworn to by D. B. Canuafax. Jurat omitted in printing.*

11 In the United States Court of Claims

[Title omitted]

ANSWER—Filed February 27, 1953

The defendant herein, by its Assistant Attorney General, answers plaintiff's petition filed December 30, 1952, as follows:

1. Admits the allegations in paragraphs 1 and 2.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3 through 8 except to admit, as alleged in paragraph 7, "that upon his death M. D. Anderson held only 18,574 shares of the 31,000 originally issued to him."

3. Admits the allegations in paragraphs 9 through 12.

12 4. Denies the allegations in paragraph 13 except to admit that a typewritten report was prepared on May 21, 1947, by revenue agent W. C. Hammett, who recommended a deficiency of $89,337.66 which was based in part upon an inclusion in income of a long-term capital gain in the amount of $402,285, and admits that this report was accepted by the Commissioner of Internal Revenue, who assessed a deficiency of $89,337.66 with interest thereon of $14,396.82, a total of $103,734.48 which was paid on August 29, 1947. Defendant alleges that this assessment was made pursuant to a Waiver of Restrictions on Assessment and Collection of Deficiency in Tax on Treasury Form 870 which was signed by the taxpayer on May 21, 1947.

5. Admits the allegations in paragraphs 14 and 15 and admits that the claim for refund was filed on October 20, 1947.

6. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 16, 18 and 19 except as stated in the paragraph next below.

7. Denies the allegations in paragraph 17 except to admit that the plaintiff's claim was rejected and also denies that the plaintiff is justly entitled to any portion of the amounts claimed in paragraph 19.

13-14 WHEREFORE, the defendant prays that the plaintiff take nothing from it in this suit, and that the petition be dismissed with costs against the plaintiff.

H. BRIAN HOLLAND,
Assistant Attorney General.

JOHN A. REES,
Attorney.

15 In the United States Court of Claims

[Title omitted]

[File endorsement omitted]

REPORT OF COMMISSIONER—Filed October 2, 1953

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled case the undersigned Commissioner makes the following report of his findings of fact:

1. The plaintiff, Anderson, Clayton & Co., is a corporation organized on December 31, 1929, and existing under the statutes of the State of Delaware with its principal business office at Houston, Texas.

2. Upon the organization of Anderson, Clayton & Co. in 1929, the corporation issued $25,842,375 of its 6½ percent preferred and 53,312½ shares of its common stock, the capital value of which was fixed at $1 per share, in exchange for 34,875 shares of the Texas joint stock association, also known as Anderson, Clayton & Co., and thereafter dissolved. On or about April 21, 1930, an additional 47,687½ shares of common were sold at $1 a share to the managing officials of the corporation resulting in the following total common stock ownership by the chief managing officials:

W. L. Clayton	44,800
M. D. Anderson	31,000
Lamar Fleming, Jr.	12,000
Harmon Whittington	5,000
D. B. Cannafax	2,750
L. L. Fleming	2,500
6 Minor Officials	1,950
	100,000

16 3. The original capitalization of the corporation, i.e., $25,842,375 of first preferred stock and $100,000 in common stock, was designed to have existing values represented by preferred stocks and to utilize the 100,000 shares of $1 common to adjust the participation of the managing officials in future earnings above the contracted return on first preferred.

4. Cotton merchandising is primarily a management business and is regarded as one of the most difficult and complex merchandising operations in the world. The results of a whole year's business

depend upon difficult day-to-day decisions by top executives as to the purchase and sale of spot cotton and the placement of hedges upon domestic and foreign futures exchanges. Long experience in all phases of the cotton business is almost essential to the success of a top cotton executive. It is difficult to obtain executives from other fields who can capably manage a cotton business.

5. The ownership of the common stock was surrounded with restrictions which were designed to insure its holding and use as a method of rewarding management. From the beginning it was understood by the common stockholders, all of whom were active in the business, that the stock was not salable outside the managing directors of the business, and that even within that group the disposition was to be made in accordance with the responsibilities of and contributions to management by the different executives as determined by the holders of at least 75 percent of the common stock. It was understood that no stockholder was entitled to sell his stock and none could keep it unless the others wanted him to. It was likewise understood from the beginning that the respective interests in the common stock would be adjusted among the managerial group as responsibility changed.

6. On February 14, 1931, an agreement in writing was entered into between the corporation and the holders of all its common stock, all of whom were actively engaged in the business. This instrument embodied, among other things, the provisions of the general understanding theretofore existing among the common stockholders with reference to the restrictions upon the holding of the stock and the plan for its use as a method of rewarding management. The agreement provided, in substance, that:

17

(1) All the common stockholders of the corporation agreed to endorse their common stock to Monroe D. Anderson as trustee for a period of 10 years.

(2) The stockholders retained the right to vote their stock.

(3) The stockholders agreed that they could not assign, transfer, or otherwise dispose of their common stock without the written consent of the holders of 75 percent of the stock.

(4) On the death of any party to the agreement, the corporation agreed to purchase the common stock of the deceased party at the value determined as of July 31, immediately preceding the death, according to the provisions made in the contract for the annual determination of value by the executive committee of the corporation, but in no event less than $1 per share, plus six percent interest from such date to the date of death.

(5) A consolidated balance sheet for the corporation and all its subsidiaries was to be prepared as of July 31 of each year (the end of its fiscal year); and, in addition, for the

private use of the individual parties to the agreement, a supplementary balance sheet, adjusted on account of appreciation and depreciation of the value of properties held by the corporation and its subsidiaries so as to reflect the true net worth of the corporation (without any allowance for good will), was also to be prepared and approved by the executive committee of the corporation as soon after the end of each fiscal year as practicable. The value of the common stock as shown in the supplementary balance sheet was to be fixed as the value of that stock for purposes of the contract.

(6) The owners of 75 percent of the common stock could at any time in writing request any party to the agreement to sell all or any part of his common stock to the corporation, or to such person as they might designate, upon terms agreeable to seller and buyer; and if seller and buyer could not agree, then according to the value fixed for the common stock in the annual supplementary balance sheet approved by the executive committee, as in the case of the death of any party to the contract.

(7) Any owner of common stock held by the trustee under the agreement could elect at any time to withdraw and sell his common stock to the corporation upon terms mutually
18 agreeable by giving written notice of his desire to the trustee. If the corporation and the party could not agree upon the selling price, then the value fixed in the annual supplementary balance sheet was to be used, substantially in the same way as in the case of death of a party.

(8) No dividends could be paid on common stock so long as the corporation was indebted in any sum whatever, nor in any event if the dividend would have the effect of lowering the book value of the stock below five million dollars as reflected in the consolidated balance sheet of the corporation, nor unless an amount of preferred stock equal to the dividend was retired at the same time.

(9) Any common stock purchased by the corporation under the terms of the agreement could be sold to the remaining parties to the agreement or to any other person whom the owners of 75 percent of the remaining stock might designate in writing.

(10) Any future holder of common stock could become a party to the agreement merely by signing it or giving his consent to its provisions in writing.

(11) All the parties to the agreement agreed that any common stock thereafter acquired by any of them, in whatever manner, should automatically be subject to all the terms of the agreement and should be endorsed to the trustee.

(12) The agreement could be amended, altered, revised, or

canceled at any time by an instrument in writing signed by the owners of 75 percent or more of the common stock.

7. Until the year ending July 31, 1937, the contract value of the common stock was, by authorization and declaration of dividends thereon in second preferred stock, maintained at approximately $1 a share, such course having been abandoned when the Commissioner sought to tax such stock dividends.

8. From time to time also as junior officials assumed more responsibilities and duties, shares of common stock were in pursuance of said agreement and in the ordinary course of business transferred by W. L. Clayton and M. D. Anderson to junior management officials so that upon his death M. D. Anderson held only 18,574 shares of the 31,000 originally issued to him.

9. All of the transfers of the corporation's common stock were made only to persons who occupied positions of managerial responsibility in the business and at the value determined under the agreement.

10. During its fiscal year ending July 31, 1944, Anderson, Clayton & Co., allocated and sold 6,500 shares of its common stock to the managing officials shown at the contracted valuation of $112.68 a share in recognition of increased responsibility and duties:

Names	Shares	Price
H. Whittington	2,000	$225,360
Sydnor Oden	1,250	140,850
W. H. Koar	1,500	169,020
J. M. Johnson	1,250	140,850
W. E. Parry	500	56,340
Total	6,500	732,420

11. The corporation received in payment the notes of the employees in the form approved by the directors. Counsel stipulated that the $112.68 received might, for the purposes of this case, be treated as though it were a cash sales price.

12. Of the officials to whom the corporation transferred 6,500 shares of the 18,574 purchased from the Estate of M. D. Anderson, Harmon Whittington was the vice-president in charge of trading policies and cotton merchandising activities; W. H. Koar, a vice-president in charge of the New York office and of relations with New York banks; Sydnor Oden, a vice-president in charge of cotton export sales; J. M. Johnson, a vice-president in charge of new plant and industrial activities; and W. E. Parry, the controller and chief accounting officer of the business.

13. The 6,500 shares of stock so allocated and sold was a part of the 18,574 shares acquired by the corporation on December 15,

1939, from the Estate of M. D. Anderson at its contracted valuation of $50.79 per share.

14. The difference between the amount of $330,136. paid the Estate of M. D. Anderson for 6,500 shares at $50.79 a share, its value at the time of the death of M. D. Anderson, in 1939, and $732,420, the price at which such stock was transferred to the managing employees mentioned in 1944 at $112.68 a share was credited by plaintiff to capital surplus and no income was reported for income tax purposes.

15. The effective certificate of incorporation of Anderson, Clayton & Co. authorized the issuance of 477,856 shares of stock, of which 300,000 shares, par value $100, was participating four percent cumulative first preferred, 75,000 shares, par value $100, was participating four percent cumulative second preferred stock, and 102,856 shares without nominal or par value was common stock. No preemptive rights existed as to common stock which could be issued at the discretion of the Board.

16. After four percent dividends on the preferred stocks were paid or set aside, the effective certificate of incorporation provided for the establishment of a "Common Stock Surplus" to consist of the undistributed surplus on July 31, 1938, less any unpaid accrued dividends on preferred, increased during each succeeding year by:

(1) Five Dollars per share on all Common Stock outstanding; and

(2) Four percent per annum on the Common Stock Surplus balance.

Any remaining undistributed surplus constituted "Participating Stock Surplus" which after payment of all cumulative preferred dividends and distribution of the entire "Common Stock Surplus" could be distributed as dividends, one-half to the Participating Preferred Stocks and one-half to Common.

17. Upon dissolution assets were distributable, first, to cover the par value and cumulative dividends of preferred stocks, then to common to cover the Common Stock Surplus and an amount of $1 per share, after which all remaining assets were divisible equally between preferred and common.

18. The agreement of February 14, 1931, was continued in effect during the taxable years involved by an instrument executed on April 16, 1943, extending its term until August 1, 1953. Such agreement provided that in case of death the value of the common stock for the purposes of the agreement should be $1 per share plus the proportionate interest of the stock in the Common Stock Surplus and Participating Stock Surplus determined by the Board of Directors as of the July 31st immediately preceding such death

plus four percent from such date to the date of death. It further provided that:

> 21 In determining such proportionate interest there shall be excluded from the common stock surplus the excess of cost of any shares of common stock held as treasury stock over $1.00 per share, and shares held as treasury stock shall be excluded from the total number of shares participating.

Any holder could be required to sell at such price upon request of 75 percent of the holders and upon withdrawal was entitled to payment for his stock at such price.

19. The balance sheet of the corporation as of July 31, 1943, approved by the Directors on November 30, 1943, showed the Capital Stock and Surplus of the corporation as follows:

Capital stock and surplus:

Participating 4% Cumulative preferred Stock, par value $100.00 per share:	
First preferred, 272,411 shares	$27,241,100.00
Second preferred, ~~54,411~~ 54441 shares	5,444,100.00
	32,685,200.00
Common stock, no par value, 84,083 shares	84,083.00
Surplus, per annexed statement	14,728,679.65
	47,497,962.65

20. The Common Stock Surplus as of July 31, 1943, was approved as follows:

Common stock surplus:

Balance at July 31, 1942		$5,079,070.03
Provision for cumulative $5.00 per share and 4% on balance	$623,352.80	
Less adjustment account 665 shares purchased	54,796.84	568,555.96
		5,647,625.~~00~~ .99

21. Valuation of the common stock as of July 31, 1943, was determined as follows:

Valuation of stocks:	
Preferred—326,852 shares outstanding, par value	$32,685,200.00
Participating surplus	4,497,212.96
Total value ($113.76 per share)	37,182,412.96
Common—84,083 shares outstanding, paid in value	$84,083.00
Common stock surplus	5,647,625.99
Participating surplus	4,583,840.70
Total value ($122.68 per share)	10,315,549.69

22. When the company bought the 18,574 shares of common stock held by M. D. Anderson at the contract price of $50.79 per share (i. e., the amended value of $48.33 as of July 31, 1938, plus interest to the date of his death), the cost over the $1 stated value of 15,539 shares was charged to Surplus-Allocated to Common Stock. The remaining 3,035 shares were sold on December 22, 1939, to W. L. Anderson at its July 31, 1939, valuation of $32.27 per share, and the loss of $18.52 a share or $56,208.20 was charged to Surplus-Allocated to Common Stock. When 1,000 shares were sold on February 28, 1941, at $33.62 a share Surplus was charged with the loss of $17,170.

23. Upon the sale of the 6,500 shares of common stock at $112.68 a share, such stock not participating in the dividend of $10 a share just previously declared on the 84,083 shares outstanding, Treasury Stock-Common was credited with the stated value of $6,500 and the excess of cost over stated value of the 6,500 shares sold in the sum of $309,526.16. Capital Surplus was credited with $725,920 the excess of the sales price over the $6,500 stated value.

24. At the time the Treasury stock was acquired, it was charged at cost, not at stated value, to "Treasury Stock-Common." To prepare balance sheet statements the difference between the stated value of the stock and its cost was set up in a reserve for valuation, and then the capital account was reduced by the stated value of the outstanding common stock as shown on the balance sheet. The cost of the stock over the stated value was charged to surplus; then when the stock was sold treasury stock was credited with its cost and the difference between cost and sales price was put into surplus as a loss or gain on treasury stock, common.

25. The common stock bought from shareholders was not can-

celled or retired but the shares outstanding less those held in the treasury were used in all financial statements, in the pay-
23 ment of dividends, in arriving at the per share values under the agreement. Treasury stock was not voted at meetings of shareholders nor taken into account in payment of dividends. During the taxable year involved there was no authorized unissued stock.

26. The stated $1 per share value of the common stock, which represented its capital under the laws of Delaware, was nominal and the substantial value of such stock was represented by the Common Stock Surplus and the Participating Surplus which amounted to $111.68 per share as of July 31, 1943, after deduction of the $10 dividend declared on November 30, 1943.

27. Under the certificate of incorporation and the common stockholders agreement and the method of accounting there required and consistently followed, the respective purchases and sales of common stock amounted in substance, in the case of purchases, to the withdrawal of earnings accumulated during the period of the ownership of such stock, and in the case of sales to new management to a deposit of an amount equal to accumulated earnings so as to equalize distributions during the ownership of such stock by the executive permitted to buy it.

28. The purchase of the 18,574 shares of the common stock from M. D. Anderson in 1939 was in conformity with the plan that the common stock should be held only by and sold only to active management. The purchase by the corporation was not for the purpose of investment or to deal in its common stock as it would the stock of another corporation. Under the stockholders agreement with the corporation such common stock could be sold only to persons and upon such terms as might be agreed upon in writing by the holders of 75 percent of the stock held by the trustee. Such stock could not be issued or transferred by the corporation until the stockholder executed acceptance of the agreement.

29. The sale of 6,500 shares of the common stock to various junior officials in December 1943, was to adjust the respective holdings in the common stock in accordance with responsibility and to reward managerial performance by the ownership of common stock which would keep cash in the business and compel the executives to acquire the proprietary interest deemed essential, and
not for the purpose of dealing in its stock as it would the
24-26 stock of another corporation.

30. Upon original issuance the corporation received $1 a share for its common stock, or $18,574, for the stock repurchased in 1939 from the M. D. Anderson estate. This repurchase of the 18,574 shares of common stock on December 15, 1939, at $50.79 a share from the M. D. Anderson estate reduced the assets of the

corporation by the amount of $943,373.46. The sale of 3,035 shares to W. L. Anderson on December 22, 1939, at $32.25 a share increased the net assets by $97,878.75, and the sale of 6,500 shares at $112.68 a share on November 30, 1943, increased the assets of the company by the amount of $732,420.

31. Following examination, the Commissioner of Internal Revenue determined that Anderson, Clayton & Co. realized a long-term capital gain in the amount of $402,285.00 on which the tax was $100,571.25 and with other adjustments determined a deficiency of $89,337.66, which was paid on August 27, 1947.

32. Claim for refund in the amount of $100,571.25 was executed October 18, 1947, and was filed by plaintiff on October 20, 1947.

33. On or about January 20, 1951, plaintiff received by registered mail an official notice, dated January 18, 1951, of disallowance of its claim of October 18, 1947.

Respectfully submitted,

WILSON COWEN,
Commissioner.

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In the United States Court of Claims

No. 626-52

ANDERSON, CLAYTON & CO. v. THE UNITED STATES

Mr. John C. White for plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General H. Brian Holland*, for defendant. *Messrs. Andrew D. Sharpe* and *Lee A. Jackson* were on the brief.

OPINION—Decided July 13, 1954

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover $100,571.25 with interest thereon as provided by law. The principal sum represents the income tax assessed by the Commissioner of Internal Revenue and paid by plaintiff on the $402,285 difference between the amount at which plaintiff purchased 6,500 shares of its capital stock from a deceased official in 1939 and the amount at which it sold and reissued the stock to other officials during its fiscal year ending July 31, 1944. Plaintiff takes the position that no taxable long term capital gain resulted from the transaction because plaintiff was not dealing in the stock as it might have in the shares of another corporation, and that under the provisions of section 22 (a) of the Internal Revenue Code and section 29.22 (a)—15 of Treasury Regulation 111, all

the facts and circumstances surrounding the transaction show that no taxable gain arose to plaintiff.

Defendant contends that Regulation 111, section 29.22 (a)—15 does not entitle plaintiff to recover as that regulation has been construed by the Circuit Courts of Appeal for several circuits on facts sufficiently similar to the facts in this case to be persuasive.

Section 22 (a) of the Code provides:

> GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Regulation 111, section 29.22 (a)—15 provides:

> *Acquisition or disposition by a corporation of its own capital stock.*—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.
>
> But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Internal Revenue Code.

The facts as stipulated by the parties may be summarized as follows: Plaintiff was organized in 1929 as a cotton merchandising business with a capitalization of $25,842,375 of first preferred stock

and $53,312.50 of common stock. In 1930 an additional
29 46,687½ shares of common stock were sold at $1 per share, making the total common stock outstanding 100,000 shares. The capital value of the no par value common stock was fixed at a stated value of $1 per share and was sold at that price to the managing officials of the corporation. No preemptive rights existed as to the common stock.

Because of the complex nature of the cotton merchandising business and the essentiality of long experience for its top executives in all phases of the business, it was decided to use the common stock of the corporation as a means to attract, retain, and incite incentive in such top officials. In 1931 a written agreement was entered into between the corporation and the various company officials who owned all the common stock whereby each of the owners endorsed his stock to Monroe D. Anderson as trustee for a period of 10 years, which period was subsequently extended, with the stockholders retaining the right to vote the stock and receive dividends thereon. The agreement provided that the stockholders would not assign, transfer, or otherwise dispose of their stock without the written consent of the holders of 75 percent of the stock; that on the death of any party to the agreement the corporation would purchase the stock of the deceased person at the special book value determined as of July 31 immediately preceding the death according to the provisions contained in the agreement relative to the annual determination of value by the executive committee of the corporation, but in no event less than $1 per share, plus 6 percent interest from such date to the date of death. The value of the trusteed stock was to be determined annually from a supplementary balance sheet which had been adjusted to show appreciation and depreciation of the value of properties held by the corporation and its subsidiaries to reflect its true net worth. The owners of 75 percent of the stock could request any party to the agreement to sell all or part of his stock to the corporation or to such person as the owners of the 75 percent might designate, either upon terms agreeable to seller and buyer or in the absence of such agreement, at the value fixed for the stock in the annual supplementary balance sheet. Any owner of the stock could sell his stock to the corporation at any time upon the same terms. Any
30 common stock purchased by the corporation under the agreement could be sold to the remaining parties or to any other person whom the owners of 75 percent of the remaining stock might designate. A more complete summary of the agreement is set forth in finding 6.

As junior officials in the corporation assumed more responsibilities, W. L. Clayton, and M. D. Anderson who at first had owned the bulk of the trusteed stock, transferred shares of their stock to

such junior officals in accordance with the provisions of the agreement. At Mr. M. D. Anderson's death in 1939, he held only 18,574 shares of the 31,000 originally issued to him. All transfers of the stock were made to persons occupying positions of managerial responsibility in the business and at the values determined under the agreement.

Upon the death of Mr. Anderson, the plaintiff corporation purchased his 18,574 shares at the contract value of July 31, 1938, which with interest, amounted to $50.79 a share or a total of $943,373.46. The cost over the $1 stated value of 15,539 of these shares was charged to the Surplus Allocated to Common Stock account. The remaining 3,035 shares of this particular stock were sold to another company official in accordance with the agreement, based on the July 31, 1939, contract value of $32.27 a share and the net "loss" of $18.52 a share or $56,208.20 was charged directly to the Surplus Allocated to Common Stock account. This stock was not retired but was held as treasury stock. While in the treasury no dividends could be paid on it and it could not be voted. Also 1,000 of these shares were sold in 1941 at $33.62 a share and the $32,620 over stated value was credited to the Surplus Allocated to Common Stock account reflecting a "loss" of $17,170 on these shares. Although the corporation sold some of these shares for less than it had paid the deceased official's estate for them, this amount was not deducted from income but was reflected in Surplus as above stated, which resulted only in a smaller Surplus Allocated to Common Stock, maintaining the equity for all common stockholders equivalent to that existing before the sales.

In December 1943, the corporation and its stockholders decided to sell 6,500 shares of the Anderson Estate stock to five of the corporation's junior officials at $112.68 a share, which was the July 31, 1943, supplementary balance sheet value less a $10 dividend payable to the old common-stock holders. The amount over the $1 stated value was credited to the Capital Surplus account (plaintiff relabeled and consolidated some of its surplus accounts) and no income was reported. It is the difference, $402,285, between the amount paid the Anderson Estate in 1939 for the stock and the price at which the stock was trasnferred to the junior managing officials during the fiscal year ending July 31, 1944, that the Commissioner of Internal Revenue determined to be a taxable long-term capital gain. Timely claim for refund was made, and denied.

Plaintiff points out that under its certificate of incorporation and the trust agreement between itself and its common-stock holders, the transaction in question amounted in substance to the payment to the deceased stockholder of his capital contribution plus his share of undistributed earnings, and in the case of the sale to

the new officials, to the equalization of their capital investment with that of the other common-stock holders as represented by the outstanding shares before the sale. Plaintiff contends that when the real nature of the transaction is considered it certainly was not dealing in its own shares as it might in the shares of another corporation and that if the first and third sentences of the Regulation mean anything, they must have been intended to exclude from taxation any gain resulting therefrom.

Prior to 1934 the law on taxable gain or loss on the acquisition and sale of a corporation's own stock was relatively clear. The Commissioner's regulations provided that no gain or loss was realized from a corporation purchasing or selling its own stock.[1] This rule was reasonable, logical and in accord with the accountant's view.[2] The First Circuit in 1932, in its opinion in *Commissioner* v. *Woods Machine Co.*, 57 F. 2d 635, laid the groundwork for the Commissioner to make a complete about-face insofar as
32 the taxation of treasury stock was concerned. On May 2, 1934, T. D. 4430 [XIII-1 C. B. 36] was promulgated amending the regulations to provide, with certain exceptions not here material, as they do today. Although the retroactive application of the part pertinent herein of the regulation was held invalid by the Supreme Court, the Court did not decide whether its prospective application would be valid. *Helvering* v. *Reynolds Co.*, 306 U. S. 110. The validity of this regulation has been specifically sustained or assumed to be valid by the Circuit Courts[3] and this Court[4] al-

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[1] U. S. Treas. Reg. 45, Art. 542 (1918 Act); U. S. Treas. Reg. 62, Art. 543 (1921 Act); U. S. Treas. Reg. 65, Art. 543 (1924 Act); U. S. Treas. Reg. 69, Art. 543 (1926 Act); U. S. Treas. Reg. 74, Art. 66 (1928 Act); U. S. Treas. Reg. 77, Art. 66 (1932 Act).

[2] Paton, Accountant's Handbook (3rd ed.), pp. 1006-1014; Report of the Committee on Accounting Procedure (American Institute of Accountants 62 J. Accountancy 417 (1938); Security and Exchange Commission Accounting Series, Release No. 6 (1938).

[3] *Allen* v. *National Manufacture & Stores Corp.*, 125 F. 239, certiorari denied, 316 U. S. 679; *Aviation Capital* v. *Pedrick*, 148 F. 2d 165, certiorari denied, 326 U. S. 723; *Brown Shoe Co.* v. *Commissioner*, 133 F. 2d 582; *Commissioner* v. *Air Reduction Co.*, 130 F. 2d 145, certiorari denied, 317 U. S. 681; *Commissioner* v. *Batten, Barton, Durstine & Osborn, Inc.*, 171 F. 2d 474, certiorari denied 338 U. S. 816; *Commissioner* v. *Landers Corp.*, 210 F. 2d 188; *Commissioner* v. *H. W. Porter & Co.*, 187 F. 2d 939; *Commissioner* v. *Rollins Burdick Hunter Co.*, 174 F. 2d 698; *Dow Chemical Co.* v. *Kavanagh*, 139 F. 2d 42; *Helvering* v. *Edison Bros. Stores*, 133 F. 2d 575, certiorari denied, 319 U. S. 752; *United States* v. *Stern Bros. & Co.*, 136 F. 2d 488. Judge Frank, in a concurring opinion in

though apparently no real distinction can be made between the sale of unissued stock, which is unquestionably a capital transaction resulting in the realization of no income or loss, and the sale of treasury stock. Treasury stock is not subjected to as high a stamp tax, is nonassessable, and is free from preemptive rights and sales price restrictions. It may be noted in this respect that the common stock of plaintiff corporation was no-par-value stock and carried no preemptive rights on original issue. None of these distinctions appear relevant in determining whether the sale of treasury stock is a capital transaction. Insofar as the corporation is concerned the sale of unissued stock and the sale of treasury stock each involve a contribution of capital by the stockholder to the corporation with the corporation incurring the same obligation and duties to the stockholder, and the purchase of the stock for retirement and resale each involve a repayment of capital to the stockholder by the corporation. Cf. *E. R. Squibb & Sons* v. *Helvering*, 98 F. 2d 69. Also, treasury stock, like unissued stock, does not have an intrinsic value, but merely represents the power and right to issue additional stock. While in the treasury this stock earns
33 nothing for the corporation, dividends are not paid on it, nor does it carry voting or any of the other rights incident to outstanding stock. It would be a courageous step to hold that a corporation can never realize income on the sale of treasury stock because it is a capital transaction. We do not find it necessary to consider whether this step should be taken because the plaintiff is entitled to recover under the plain terms of the regulation as we construe it.

The Commissioner's position that income may be realized by a corporation on the sale of treasury stock may be justified on the ground that as a practical matter some corporations do deal in their own stock just as though it were an asset, buying it, holding it as an investment, and selling it at opportune times. That is the type of situation that we believe the portion of the regulation here in question covers.

The Tax Court, not withstanding reversals, has for a number of years uniformly applied this regulation literally and examined the real nature of the transaction considering all the facts and circumstances in determining whether or not the transaction resulted in a taxable gain. The Tax Court maintains the position

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Commissioner v. *Batten, Barton, Durstine & Osborn, Inc.*, *supra*, after stating that it was irrational to ever consider treasury stock as a capital asset said: "The situation then, to my mind, is like that in a farce: An untenable premise, once adopted, is to be carried out logically."

[4] *Wiegand Co.* v. *United States*, 104 C. Cls. 111.

that if a corporation buys and sells its own shares for the purpose of satisfying contractual obligations, equalizing shareholdings, eliminating a participant wishing to retire, implementing an employee profit sharing plan, or keeping the ownership of the corporation within a particular group, the corporation is not dealing in its own shares as it would in another corporation because the treasury shares are not treated as assets and are not bought and sold for the purpose of making a profit, and accordingly, holds that no taxable gain or loss is realized.[5]

The Circuit Courts of Appeal have, with equal uniformity, with some judges dissenting, adopted the position that unless the corporation repurchasing its own stock legally retires it according to State law and issues new stock, the transaction results in taxable gain or loss to the corporation.[6]

We agree with the Tax Court's position because: (1) we entertain some doubt as to whether a corporation's purchasing and selling its own stock is not really a capital transaction, (2) the basis for the Circuit Courts' decisions is one of form only in that it rests entirely on the failure of the corporation to go through the formal mechanics of actually retiring the stock and issuing new stock, and (3) the plain terms of the regulation support the Tax Court's position. When the regulation is viewed in this light, plaintiff falls comfortably within the language and purview of the regulation. The plaintiff did not purchase the stock at opportune times. It was obligated by contract to repurchase the stock when a stockholder died, at a price equal to the book value of the stock as determined from a supplementary balance sheet reflecting the true net worth of the corporation. This is how the stock in question was purchased by the corporation. The corporation was also obligated to purchase the stock of any common-stock holder who left the corporation, or for any reason withdrew from the agreement, at a negotiated price or in the event of their inability to agree, at the price determined similar to that of a deceased stockholder. The time of sale was clearly not dictated by profit on the sale of the stock. As a matter of fact some of the stock was sold at a "loss," and the approval of 75 percent of the common-

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[5] *Dr Pepper Bottling Co. of Miss.*, 1 T. C. 80; *Brockman Oil Well Cementing Co.*, 2 T. C. 168; *Cluett, Peabody & Co., Inc.*, 3 T. C. 169; *Rolling Burdick Hunter Co.*, 9 T. C. 169, rev'd 174 F. 2d 698; *Batten, Barton, Durstine & Osborn, Inc.*, 9 T. C. 448; *rev'd* 171 F. 2d 474; *H. W. Porter & Co.*, 14 T. C. 307, *rev'd* 187 F. 2d 939; *The Landers Corp.*, 11 T. C. M. 571, *rev'd* 210 F. 2d 188; *Timken-Detroit Axle Co.*, 21 T. C. No. 85 (decided Feb. 26, 1954).

[6] See footnote 3.

stock holders was required for these transactions. The provisions of the certificate of incorporation and the trust agreement were designed to attract, retain, and incite incentive in competent officials, which were a necessity because of the complex nature of its business. The common stock was trusteed under conditions that assured its receipt and retention by only active management and its redistribution according to changing managerial responsibility.

Pursuant to its certificate of incorporation and the trust agreement, plaintiff purchased Mr. M. D. Anderson's 18,574 shares at his death in 1939, for the contract value of $50.79 a share. In 1943, in accordance with plaintiff's policy, it sold 6,500 of these shares to junior officials of the corporation for $112.68 a share, which was the contract value less a $10 dividend payable to the old common-stock holders. This differential, which the Commissioner claims should be taxed, represents largely, if not entirely, accumulated earnings of the corporation which have already been subjected to tax. The respective purchases and sale of this common stock amounted in substance (1) in the case of purchases by the corporation, to the withdrawal by the stockholder of his capital contribution plus his undistributed earnings accumulated during the period of his ownership of such stock, and (2) in the case of sales by the corporation to new managers, to a contribution of capital in an amount equal to the existing stockholder's contributed capital plus accumulated undistributed earnings so as to equalize the equity of all common-stock holders and the distributions thereafter during the ownership of such stock by the executive permitted to buy it. On these facts it is rather difficult to comprehend how plaintiff corporation realized an accession to income. Upon examining the real nature of the transaction, considering all the facts and circumstances, we arrive at the conclusion that plaintiff was not dealing in its own shares as it might in the shares of another corporation.

The *Wiegand Co.* v. *United States* case, 104 C. Cls. 111, upon which defendant relies, is distinguishable on its facts.

Notwithstanding the uniformity of the decisions of the Circuit Courts on this issue, we are unable to agree with them. To say that there is a taxable gain merely because there is a difference between the purchase and sales price is really to assume the question in issue. There also can be a difference in the cost of stock retired and the price at which new stock is issued, but the resulting difference is not taxable or deductible because it is a capital transaction. Consequently, the question that confronts the court in these cases, assuming the regulation to be valid, is whether the treasury stock was treated in substance as an asset rather than stock of the corporation. To do this requires an examination of all the facts and circumstances of the case. Although the Circuit Court's view, considering the one factor of failing to actually retire the stock

as controlling, is an expeditious method of determining taxability of treasury stock, it must be conceded that this distinction between treasury stock and unissued stock is one of form. Moreover, it would be equally expeditious to hold that the acquisition and sale of a corporation's own stock was a capital transaction, since
36 it does as a practical matter result in readjustment of capital and find support in the famous case of *Eisner* v. *Macomber*, 252 U. S. 189. We therefore conclude that plaintiff is entitled to recover $100,571.25 plus interest allowed by law.

It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

Judge LARAMORE took no part in the consideration or decision of this case.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner Wilson Cowen, makes the following findings of fact:

1. The plaintiff, Anderson, Clayton & Co., is a corporation organized on December 31, 1929, and existing under the statutes of the State of Delaware, with its principal business office at Houston, Texas.

2. Upon the organization of Anderson, Clayton & Co. in 1929, the corporation issued $25,842,375 of its 6½ percent preferred and 53,312½ shares of its common stock, the capital value of which was fixed at $1 per share, in exchange for 34,875 shares of the Texas joint stock association, also known as Anderson, Clayton & Co., which thereafter dissolved. On or about April 21, 1930, an additional 46,687½ shares of common were sold at $1 a share to the managing officials of the corporation resulting in the following total common stock ownership by the chief managing officials:

W. L. Clayton	44,800
M. D. Anderson	31,000
Lamar Fleming, Jr.	12,000
Harmon Whittington	5,000
D. B. Cannafax	2,750
L. L. Fleming	2,500
Six minor officials	1,950
	100,000

3. The original capitalization of the corporation, i. e., $25,842,375 of first preferred stock and $100,000 in common stock, was designed to have existing values represented by preferred stocks and

to utilize the 100,000 shares of $1 common to adjust the participation of the managing officials in future earnings above the
37 contracted return on first preferred.

4. Cotton merchandising is primarily a management business and is regarded as one of the most difficult and complex merchandising operations in the world. The results of a whole year's business depend upon difficult day-to-day decisions by top executives as to the purchase and sale of spot cotton and the placement of hedges upon domestic and foreign futures exchanges. Long experience in all phases of the cotton business is almost essential to the success of a top cotton executive. It is difficult to obtain executives from other fields who can capably manage a cotton business.

5. The ownership of the common stock was surrounded with restrictions which were designed to insure its holding and use as a method of rewarding management. From the beginning it was understood by the common-stock holders, all of whom were active in the business, that the stock was not salable outside the managing directors of the business, and that even within that group the disposition was to be made in accordance with the responsibilities of and contributions to management by the different executives as determined by the holders of at least 75 percent of the common stock. It was understood that no stockholder was entitled to sell his stock and none could keep it unless the others wanted him to. It was likewise understood from the beginning that the respective interests in the common stock would be adjusted among the managerial group as responsibility changed.

6. On February 14, 1931, an agreement in writing was entered into between the corporation and the holders of all its common stock, all of whom were actively engaged in the business. This instrument embodied, among other things, the provisions of the general understanding theretofore existing among the common-stock holders with reference to the restrictions upon the holding of the stock and the plan for its use as a method of rewarding management. The agreement provided, in substance, that:

(1) All the common-stock holders of the corporation agreed to endorse their common stock to Monroe D. Anderson as trustee for a period of 10 years.

38 (2) The stockholders retained the right to vote their stock.

(3) The stockholders agreed that they could not assign, transfer, or otherwise dispose of their common stock without the written consent of the holders of 75 percent of the stock.

(4) On the death of any party to the agreement, the corporation agreed to purchase the common stock of the deceased

party at the value determined as of July 31, immediately preceding the death, according to the provisions made in the contract for the annual determination of value by the executive committee of the corporation, but in no event less than $1 per share, plus six percent interest from such date to the date of death.

(5) A consolidated balance sheet for the corporation and all its subsidiaries was to be prepared as of July 31 of each year (the end of its fiscal year); and, in addition, for the private use of the individual parties to the agreement, a supplementary balance sheet, adjusted on account of appreciation and depreciation of the value of properties held by the corporation and its subsidiaries so as to reflect the true net worth of the corporation (without any allowance for good will), was also to be prepared and approved by the executive committee of the corporation as soon after the end of each fiscal year as practicable. The value of the common stock as shown in the supplementary balance sheet was to be fixed as the value of that stock for purposes of the contract.

(6) The owners of 75 percent of the common stock could at any time in writing request any party to the agreement to sell all or any part of his common stock to the corporation, or to such person as they might designate, upon terms agreeable to seller and buyer; and if seller and buyer could not agree, then according to the value fixed for the common stock in the annual supplementary balance sheet approved by the executive committee, as in the case of the death of any party to the contract.

(7) Any owner of common stock held by the trustee under the agreement could elect at any time to withdraw and sell his common stock to the corporation upon terms mutually agreeable by giving written notice of his desire to the trustee. If the corporation and the party could not agree upon the selling price, then the value fixed in the annual supplementary balance sheet was to be used, substantially in the same way as in the case of death of a party.

39 (8) No dividends could be paid on common stock so long as the corporation was indebted in any sum whatever, nor in any event if the dividend would have the effect of lowering the book value of the stock below five million dollars as reflected in the consolidated balance sheet of the corporation, nor unless an amount of preferred stock equal to the dividend was retired at the same time.

(9) Any common stock purchased by the corporation under the terms of the agreement could be sold to the remaining parties to the agreement or to any other person whom the

owners of 75 percent of the remaining stock might designate in writing.

(10) Any future holder of common stock could become a party to the agreement merely by signing it or giving his consent to its provisions in writing.

(11) All the parties to the agreement agreed that any common stock thereafter acquired by any of them, in whatever manner, should automatically be subject to all the terms of the agreement and should be endorsed to the trustee.

(12) The agreement could be amended, altered, revised, or canceled at any time by an instrument in writing signed by the owners of 75 percent or more of the common stock.

7. Until the year ending July 31, 1937, the contract value of the common stock was, by authorization and declaration of dividends thereon in second preferred stock, maintained at approximately $1 a share, such course having been abandoned when the Commissioner sought to tax such stock dividends.

8. From time to time also as junior officials assumed more responsibilities and duties, shares of common stock were in pursuance of said agreement and in the ordinary course of business transferred by W. L. Clayton and M. D. Anderson to junior management officials so that upon his death M. D. Anderson held only 18,574 shares of the 31,000 originally issued to him.

9. All of the transfers of the corporation's common stock were made only to persons who occupied positions of managerial responsibility in the business and at the value determined under the agreement.

10. During its fiscal year ending July 31, 1944, Anderson, Clayton & Co. allocated and sold 6,500 shares of its common stock to the managing officials shown at the contracted valuation of $112.68 a share in recognition of increased responsibility and duties:

Names	Shares	Price
H. Whittington	2,000	$225,360
Sydnor Oden	1,250	140,850
W. H. Koar	1,500	169,020
J. M. Johnson	1,250	140,850
W. E. Parry	500	56,340
Total	6,500	732,420

11. The corporation received in payment the notes of the employees in the form approved by the directors. Counsel stipulated that the $112.68 received might, for the purposes of this case, be treated as though it were a cash sales price.

12. Of the officials to whom the corporation transferred 6,500

shares of the 18,574 purchased from the Estate of M. D. Anderson, Harmon Whittington was the vice-president in charge of trading policies and cotton merchandising activities; W. H. Koar, a vice-president in charge of the New York office and of relations with New York banks; Sydnor Oden, a vice-president in charge of cotton export sales; J. M. Johnson, a vice-president in charge of new plant and industrial activities; and W. E. Parry, the controller and chief accounting officer of the business.

13. The 6,500 shares of stock so allocated and sold was a part of the 18,574 shares acquired by the corporation on December 15, 1939, from the Estate of M. D. Anderson at its contracted supplementary balance sheet valuation of $50.79 per share.

14. The difference, over stated value, between the amount of $330,135 paid the Estate of M. D. Anderson for 6,500 shares at $50.79 a share, its value at the time of the death of M. D. Anderson in 1939, and $732,420, the price at which such stock was transferred to the managing employees mentioned in 1944 at $112.68 a share was credited by plaintiff to Capital Surplus (plaintiff consolidated and relabeled some of its surplus accounts) and no income was reported for income tax purposes.

15. The effective certificate of incorporation of Anderson, Clayton & Co. authorized the issuance of 477,856 shares of stock, of which 300,000 shares, par value $100, was participating four percent cumulative first preferred, 75,000 shares, par value $100, was participating four percent cumulative second preferred stock, and 102,856 shares without nominal or par value was common stock. No preemptive rights existed as to common stock which could be issued at the discretion of the Board.

16. After four percent dividends on the preferred stocks were paid or set aside, the effective certificate of incorporation provided for the establishment of a "Common Stock Surplus" to consist of the undistributed surplus on July 31, 1938, less any unpaid accrued dividends on preferred, increased during each succeeding year by:

> (1) Five Dollars per share on all Common Stock outstanding; and
>
> (2) Four percent per annum on the Common Stock Surplus balance.

Any remaining undistributed surplus constituted "Participating Stock Surplus" which after payment of all cumulative preferred dividends and distribution of the entire "Common Stock Surplus" could be distributed as dividends, one-half to the Participating Preferred Stocks and one-half to Common.

17. Upon dissolution assets were distributable, first, to cover the par value and cumulative dividends of preferred stocks, then to common to cover the Common Stock Surplus and an amount of $1

per share, after which all remaining assets were divisible equally between preferred and common.

18. The agreement of February 14, 1931, was continued in effect during the taxable years involved by an instrument executed on April 16, 1943, extending its term until August 1, 1953. Such agreement provided that in case of death the value of the common stock for the purposes of the agreement should be $1 per share plus the proportionate interest of the stock in the Common Stock Surplus and Participating Stock Surplus determined by the Board of Directors as of the July 31st immediately preceding such death plus four percent from such date to the date of death. It further provided that:

> In determining such proportionate interest there shall be excluded from the common stock surplus the excess of cost of any shares of common stock held as treasury stock over $1.00 per share, and shares held as treasury stock shall be excluded from the total number of shares participating.
>
> Any holder could be required to sell at such price upon re-
> 42 quest of 75 percent of the holders and upon withdrawal was entitled to payment for his stock at such price.

19. The balance sheet of the corporation as of July 31, 1943, approved by the Directors on November 30, 1943, showed the Capital Stock and Surplus of the corporation as follows:

43 22. When the company bought the 18,574 shares of common stock held by M. D. Anderson at the contract price of $50.79 per share (i. e., the amended value of $48.33 as of July 1, 1938, plus interest to the date of his death), the cost over the $1 stated value of 15,539 shares was charged to Surplus-Allocated to Common Stock. The remaining 3,035 shares were sold on December 22, 1939, to W. L. Anderson at its July 31, 1939, valuation of $32.27 per share, and the difference between the $50.79 cost per share and the $32.27 selling price per share, or $56,208.20, was charged to Surplus-Allocated to Common Stock. When 1,000 shares were sold on February 28, 1941, at $33.62 a share Surplus Allocated to Common Stock was credited with $32,620 (the selling price over stated value, or $32.62 per share), which resulted in a net deficit of $17,170 for these 1,000 shares.

23. Upon the sale of the 6,500 shares of common stock at $112.68 a share, such stock not participating in the dividend of $10 a share just previously declared on the 84,083 shares outstanding, Treasury Stock-Common was credited with the stated value of $6,500 and the excess of cost over stated value of the 6,500 shares sold in the sum of $323,635 [$309,526.16 plus $14,108.84]. Capital Surplus was credited with $725,920, the excess of the sales price over the $6,500 stated value.

For the remainder of Finding No. 19 and Findings No. 20 & 21, see pages 12 & 13. (Omitted in error by printer)

24. At the time the Treasury stock was acquired, it was charged at cost, not at stated value, to "Treasury Stock-Common." To prepare balance sheet statements the difference between the stated value of the stock and its cost was set up in a reserve for valuation, and then the capital account was reduced by the stated value of the outstanding common stock as shown on the balance sheet. The cost of the stock over the stated value was charged to surplus; then when the stock was sold treasury stock was credited with its cost and the difference between cost and sales price was put into surplus.

25. The common stock bought from shareholders was not cancelled or retired but the shares outstanding less those held in the treasury were used in all financial statements, in the payment of dividends, in arriving at the par share values under the agreement. Treasury stock was not voted at meetings of shareholders
44 nor taken into account in payment of dividends. During the taxable year involved there was no authorized unissued stock.

26. The stated $1 per share value of the common stock, which represented its capital under the laws of Delaware, was nominal and the substantial value of such stock was represented by the Common Stock Surplus and the Participating Surplus which amounted to $111.68 per share as of July 31, 1943, after deduction of the $10 dividend declared on November 30, 1943.

27. Under the certificate of incorporation, the agreement between the corporation and its common-stock holders and the method of accounting there required and consistently followed, the respective purchases and sales of common stock amounted in substance, in the case of purchases by the corporation, to the withdrawal by the stockholder of earnings accumulated during the period of the ownership of such stock, and in the case of sales by the corporation to new managers to a contribution of capital in an amount equal to accumulated earnings so as to equalize the common equity of all stockholders and the distributions during the ownership of such stock by the executive permitted to buy it.

28. The purchase of the 18,574 shares of the common stock from M. D. Anderson in 1939 was in conformity with the plan that the common stock should be held only by and sold only to active management. The purchase by the corporation was not for the purpose of investment or to deal in its common stock as it would the stock of another corporation. Under the stockholders agreement with the corporation such common stock could be sold only to persons and upon such terms as might be agreed upon in writing by the holders of the 75 percent of the stock held by the trustee. Such stock could not be issued or transferred by the corporation until the stockholder executed acceptance of the agreement.

29. The sale of 6,500 shares of the common stock to various junior officials in December 1943, was to adjust the respective

holdings in the common stock in accordance with responsibility and to reward managerial performance by the ownership of common stock which would keep cash in the business and compel the executives to acquire the proprietary interest deemed essential,
45-46 and not for the purpose of dealing in its stock as it would the stock of another corporation.

30. Upon original issuance the corporation received $1 a share for its common stock, or $18,574, for the stock repurchased in 1939 from the M. D. Anderson estate. This repurchase of the 18,574 shares of common stock on December 15, 1939, at $50.79 a share from the M. D. Anderson estate reduced the assets of the corporation by the amount of $943,373.46. The sale of 3,035 shares to W. L. Anderson on December 22, 1939, at $32.27 a share increased the net assets by $97,939.45, and the sale of 6,500 shares at $112.68 a share on November 30, 1943, increased the assets of the company by the amount of $732,420.

31. Following examination, the Commissioner of Internal Revenue determined that Anderson, Clayton & Co. realized a long-term capital gain in the amount of $402,285.00 on which the tax was $100,571.25 and with other adjustments determined a deficiency of $89,337.66, which was paid on August 27, 1947.

32. Claim for refund in the amount of $100,571.25 was executed October 18, 1947, and was filed by plaintiff on October 20, 1947.

33. On or about January 20, 1951, plaintiff received by registered mail an official notice, dated January 18, 1951, of disallowance of its claim of October 18, 1947.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States One Hundred Thousand Five Hundred Seventy-one Dollars and Twenty-five Cents ($100,571.25), with interest as provided by law.

47-48 PROCEEDINGS FOLLOWING OPINION OF THE COURT

On August 23, 1954, defendant filed a motion for a new trial or for a rehearing.

On October 5, 1954, the court entered the following order on said motion:

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 and 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this fifth day of October, 1954, that said motions be and the same are overruled as follows:

626-52 Anderson, Clayton & Co. Defendant's motion.

BY THE COURT.
(S) MARVIN JONES,
Chief Judge.

49 Clerk's Certificate to foregoing transcript omitted in printing.

50 IN THE UNITED STATES COURT OF CLAIMS

No. 626-52

ANDERSON, CLAYTON & CO., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

TRANSCRIPT OF TESTIMONY

Houston, Texas,
June 15, 1953,
Monday, at 10 a.m.

TESTIMONY FOR PLAINTIFF

The parties met, pursuant to notice of the Commissioner, at the time above stated, in Room 616, Federal Office Building, Houston, Texas.

Present:

Hon. WILSON COWEN, Commissioner;

APPEARANCES

JOHN C. WHITE, Esq., counsel for plaintiff;
JOHN A. REES, Esq., counsel for defendant.

On order of reference by the Honorable, the United States Court of Claims, in the above entitled cause, testimony on behalf of the plaintiff was taken as follows:

(The reporter was duly sworn by the Commissioner.)

Commissioner COWEN: We will come to order, now, Gentlemen. I would like to inquire first whether or not the parties have been able to stipulate at least a portion.

OFFERS IN EVIDENCE

Mr. WHITE: Yes, Mr. Commissioner. At first, I should say, perhaps, that Anderson, Clayton & Co. admits a number of the
51 allegations in the petition, then by work on Saturday, the counsel have reached certain agreement, and I would like to dictate those.

Commissioner COWEN: You may.

Mr. WHITE: Counsel agreed that you may include among the findings of fact the finding of the Tax Court in the case of Monroe D. Anderson, eighth Tax Court 706. Those findings were, in part, the basis of the petition and set out the general situation with respect to the stock involved here.

Based on a personal examination by respective counsel of original records maintained by the company, counsel further agreed that the following statements of fact are true:

1. That common stock held in the treasury was not voted in any meeting of stockholders nor taken into account in the payment of dividends.

2. That petitioner's first exhibit shows correctly the valuations placed on the common stock under the agreement.

I would like to offer that if I may.

Commissioner COWEN: It may be marked as plaintiff's exhibit no. 1.

(The document above referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. WHITE: That petitioner's exhibit, two shows correctly the transactions of the corporation in its common stock and the common price thereof.

52 Commissioner COWEN: It may be marked as Plaintiff's Exhibit No. 2.

(The document above referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Mr. WHITE: Then I should like to offer the stockholders' agreement, as amended April 16, 1943, which was in effect as of the date of these transactions.

Commissioner COWEN: That may be marked as Plaintiff's Exhibit No. 3, being a document consisting of about eight pages plus the title sheet.

(The document above referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Mr. WHITE: Then I wish to offer the consent of the common stockholders to the transfers of common stock involved in this transaction.

Commissioner COWEN: It may be marked as Plaintiff's Exhibit No. 4.

(The document above referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Mr. WHITE: Then I should like to offer the agreement of merger of Anderson, Clayton & Co. of California into Anderson, Clayton & Co. of Delaware, which sets out the charter of the corporation in effect at the time of these transactions. I should like to be able to withdraw this and substitute a photostatic copy of
53 same.

Commissioner COWEN: It may be done. You understand you must forward it to the reporter before the reporter sends the transcriptions.

(Photostatic copy of the document above referred to is to be marked Plaintiff's Exhibit No. 5 for identification.)

Mr. WHITE: At this time I want to offer the minutes of meeting of the Directors of November 30, 1943, and this I want to supply to the reporter because it is being copied at the moment.

Commissioner: Yes, you will supply that in photostat or typewritten form. When received, that may be marked as Plaintiff's Exhibit No. 6.

(Photostatic copy of the document above referred to is to be marked Plaintiff's Exhibit No. 6 for identification.)

Commissioner COWEN: There being no exceptions, Mr. Rees, to Plaintiff's Exhibits?

Mr. REES: There are no objections.

Commissioner COWEN: Therefore, the exhibits of Plaintiff 1 to 6 inclusive are received in evidence.

(The documents above referred to, previously marked for identification as Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6, are now received in evidence under the same numbers.)

Mr. WHITE: I want to call Mr. Cannafax to the stand.
54 Commissioner COWEN: Yes.

DUDLEY B. CANNAFAX, a witness produced by the plaintiff, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

Commissioner COWEN: Will you please state your name for the record.

The WITNESS: Dudley B. Cannafax.

Commissioner COWEN: Where do you reside now, Mr. Cannafax?

The WITNESS: No. 16, Sunset Boulevard, Houston.

Commissioner COWEN: All right, Mr. White, you may examine.

DIRECT EXAMINATION.

By Mr. WHITE:

1Q. Mr. Cannafax, will you please state your connection with Anderson, Clayton?

A. I am Vice-President and Treasurer at the present.

2Q. How long have you held that position?

A. That specific position, I suppose, from 1943.

3Q. And briefly what other positions have you held?

A. I was Managing Director of Anderson, Clayton & Co. Joint Stock Association from 1930 until its dissolution in 1943.

4Q. Did you have any function in connection with the agreement of the common stockholders of Anderson, Clayton & Co.?

A. I was a party to the agreement and I had that connection with it.

55 5Q. And after the death of Mr. Anderson, who was the trustee of that agreement?

A. I was.

6Q. I show you Petitioner's Exhibit No. 5, which is consent to the transfer of 6,500 shares involved, and ask you whether you were familiar with it.

A. Yes.

7Q. Are you familiar with the finding of fact of the Tax Court in docket in the Estate of Monroe B. Anderson, Eighth Tax Court number 706, page 706?

A. Yes.

8Q. Was the transfer referred to in the agreement before you made in accordance with and for the same purposes as those related in the finding of fact?

A. They were.

Mr. WHITE: That's all.

Commissioner COWEN: Just a minute, Mr. Cannafax.

Mr. Rees?

Mr. REES: No questions.

Commissioner COWEN: No questions. You may be excused, Mr. Cannafax. Thank you.

(Witness excused.)

Mr. REES: Mr. Commissioner, just to make certain the record covers one other fact that could be important, paragraph 9 of the

petition in this case refers to a sale of certain shares of
56 common stock by the taxpayer corporation at a contract evaluation of $112.68 a share. Counsel agreed that for the purpose of this case that $112.68 may be treated as though it were a cash sale price.

Commissioner COWEN: The same as the market value?

Mr. REES: No, the cash sale price. The record would otherwise show that part of that sum was covered by promissory notes, but those notes, of course were treated as being, and they were in fact, the same as face amount.

Commissioner COWEN: So it was the same as cash sale.

Mr. WHITE: Mr. Parry, please.

WILLIAM E. PARRY, a witness produced by the plaintiff, having been first duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

Commissioner COWEN: Mr. Parry, state your name.

The WITNESS: William E. Parry.

Commissioner COWEN: And where do you reside, Mr. Parry?

The WITNESS: 2407 Pelham Drive, Houston, Texas.

DIRECT EXAMINATION.

By Mr. WHITE:

1Q. Mr. Parry, will you state your position with Anderson, Clayton & Co.?

A. I am Controller of Anderson, Clayton.

2Q. What are your functions?

57 A. Supervising of all accounting, original books of record, tax auditing; the usual duties of the controller.

3Q. Are you familiar with the method of accounting which was made with respect to these transactions in the common stock of Anderson, Clayton & Co.?

A. I am.

4Q. Will you please state how they were handled, and in the statement refer to the records from which you are testifying.

A. May I get them?

Commissioner COWEN: Yes.

The WITNESS: Do you want me to start——

Commissioner COWEN: Perhaps you should offer for identification at least the records from which you will testify. Will you state what they are so they may be identified?

The WITNESS: Treasury stock common.

Commissioner COWEN: Mr. Parry, is that a sheet from your ledgers?

The WITNESS: Ledger sheet transactions related to the common treasury stock.

Mr. WHITE: May that be marked as Plaintiff's Exhibit 7?

Commissioner COWEN: It will be so marked.

(The document above referred to was marked Plaintiff's Exhibit No. 7 for identification.)

The WITNESS: Surplus account.

58 Mr. WHITE: That also is a sheet from your ledger?

The WITNESS: From the ledger, photostat. One or two sheets. One sheet, both sides.

Commissioner COWEN: What does that show, Mr. Parry?

The WITNESS: That shows the transactions and the totalling of the exchange of par value over cost.

Commissioner COWEN: That may be marked as Plaintiff's Exhibit 8.

(The document above referred to was marked Plaintiff's Exhibit No. 8 for identification.)

Mr. WHITE: Do you have a third exhibit?

The WITNESS: Yes, third exhibit is the ledger sheet surplus allocated to common stock.

Commissioner COWEN: Explain that a little, Mr. Parry, so we will understand what that shows.

The WITNESS: The Company had three classes of stock: first preferred, second preferred, having fixed rate of earnings. Then, after allocations of earnings in excess of those fixed rates, it was to go between common and the first and second preferred that were known as participating. They participate over the fixed rate after a certain part had been allocated to common. This—I don't know whether this is necessary or not.

Commissioner COWEN: That may be marked as Plaintiff's Exhibit No. 9.

(The document above referred to was marked Plaintiff's Exhibit No. 9 for identification.)

59 By Mr. WHITE:

Q. Then will you explain for the record, Mr. Parry, how these transactions are shown on your books, referring to those exhibits by number if you can.

Commissioner COWEN: He may want to look at them.

The WITNESS: At the time the treasury stock is acquired,—was acquired—it was charged at cost at the stated value and reduced to treasury stock, common. In preparing—For purposes of preparing balance sheet statements we would charge surplus and set up a re-

serve for valuation for the difference between the par value of the stock, one dollar, and what it had cost, and then we would deduct the capital, the treasury stock, from the issued stock to arrive at the stock as shows outstanding on our balance sheet. Of course, those surplus have been charged to surplus. When the stock was sold, we would take it out of treasury stock at the cost we had put it in and adjust this reserve and values and put the loss or gain into surplus as a loss or gain on treasury stock, common.

One of the first transactions—I don't knew whether you want this.

By Mr. WHITE:

6Q. Yes, I want to ask you how these excess in cost above the——

A. I was going to give you an example with a copy of the original voucher here.

60 7Q. All right, go ahead.

A. One of the first.—No, it wouldn't be one of the first either. The first sale of the treasury stock acquired from the estate of Mr. M. D. Anderson was to W. L. Anderson, 3,035 shares. This stock was purchased at $50.79 a share and sold for $32.27 a share, resulting in a loss of $18.52 a share. The total value—sale value—was $97,939.45.

This stock was paid for by surrendering first preferred stock, par value $26,500; second preferred stock, par value $55,600 in debentures, par value—face value—$15,800.00; and cash $39.45. The first and second preferred stocks were subsequently cancelled, retired.

8Q. How was the loss treated on your books?

A. The loss of $18.52 a share, or $56,208.20, was charged direct to surplus and treated as non-taxable income, or non-deductable expense in the income tax return for that year.

9Q. Were other transactions in which you had loss or gains on the transfer or sale of this treasury stock treated in a similar manner?

A. Yes, all transactions in treasury stocks in loss or gains were treated as direct surplus items and as not being taxable income or deductible expense.

10Q. The common stock that you bought from shareholders was never cancelled or retired?

A. No, but in the entire treatment—in all financial state-
61 ments, payment of dividends and everything—in arriving at the per share values under the agreement were based on the shares outstanding less the treasury stock, so for all intent and purposes it was retired.

(Discussion off the record.)

By Mr. WHITE:

11Q. Mr. Parry, are you familiar with the treatment on the books of these particular transactions in sixty-five—in the sale of 6,500 shares?

A. I am, definitely.

12Q. Do you have available and will you supply the reported photostatic copies of those actual ledger sheets?

A. Yes, I will.

Mr. WHITE: And may they be marked and received as Petitioner's Exhibits Nos. 10 and 11?

Commissioner COWEN: Yes, they may be marked and received as Plaintiff's Exhibits 10 and 11.

(Photostatic copies of the documents above referred to are to be marked Plaintiff's Exhibits Nos. 10 and 11 for identification.)

Commissioner COWEN: I think we ought to ask him how those particular transactions were handled, Mr. White.

By Mr. WHITE:

13Q. Yes, will you state how the profit you gained on those was handled?

A. This stock was bought at $50.79 and it sold for $112.68,
62 I believe it was.

14Q. Yes.

A. We gave notes. All of us gave notes. It was all by note. The notes were charged to notes receivable, employees, and the gain on the sale was credited to surpluses, direct to surplus, and treated as a non-taxable gain.

15Q. As a capital——

A. As a capital service.

Mr. WHITE: That's all I have, Mr. Commissioner.

The WITNESS: John, there will be three exhibits: surplus, treasury stock, and I think that year we divided all this into capital surplus. We set up a capital surplus.

Mr. WHITE: Instead of two additional exhibits, there will be three.

The WITNESS: Yes.

(Discussion off the record.)

Mr. WHITE: May we make that Petitioner's Exhibit 12?

Commissioner COWEN: Plaintiff's Exhibit No. 12.

(The document above referred to was marked Plaintiff's Exhibit No. 12 for identification.)

(Discussion off the record.)

CROSS EXAMINATION.

By Mr. REES:

1Q. Does the Exhibit No. 8 show the date of that first sale of 3,035 shares?

63 A. Yes, that shows December 22, 1939.

2Q. And that's before the period involved in this hearing?

A. Yes, that was just the—it was unusual to me because we got that much yet that little cash. But that's the first transaction in that stock.

3Q. Now, Mr. Parry, speaking and thinking entirely from an accounting standpoint without any regard to tax problems, tell us whether or not in your opinion the loss on that sale of 3,035 shares which was charged to surplus, tell us whether or not that loss on that sale of 3,035 shares which was charged to surplus was in any accounting or bookkeeping sense a true loss to the Company or purely a fictional transaction.

A. I would say it was a true loss, not strictly from accounting. Strictly from accounting, had the stock been retired they would have paid the extent of X dollars for the stock, and had they issued new stock they would have gotten less money for the new stock when they issued it, so the business in itself was out cash.

4Q. That was the answer I had in mind. The business was out cash.

A. To that extent.

5Q. Now, let's take one of the other transactions which occurred during the period involved in this suit for a transaction where a profit or a gain from an accounting standpoint was carried to the same surplus account, showing from an accounting viewpoint without any regard to a tax problem, was there in your opinion

64 any gain or profit or income to the Company in a true sense?

A. The Company's cash position improved.

6Q. Improved, yes. Thank you, that's the answer I had in mind.

A. Assuming you treat a note of that type as a cash transaction.

Mr. WHITE: Which we did.

By Mr. REES:

7Q. In other words, a stipulation between Mr. White and me this morning is a proper act?

A. Yes.

8Q. Now, during the period involved in this suit, were there any unissued shares of common stock held by the Company?

A. No, there wasn't. We had authorized up to July 31, '43, 120,000 shares opened.

Mr. WHITE: No, the charter which I offered, which Mr. Rees didn't have too much opportunity to examine, shows that there were outstanding issued number of shares authorized.

By Mr. REES:

9Q. Now, Mr. Parry, paragraph 12 in the petition before us today recites that no income was reported for federal tax purposes as having resulted from the transactions in the 6,500 shares of stock which were sold at a unit price larger than their unit cost.

Did you have anything to do with the preparation of the
65 tax return?

A. They are all prepared under my supervision and I approve them before they are properly signed.

10Q. In the preparation of those returns you did not report any income from these transactions?

A. No, sir, we treated it entirely as a surplus adjustment.

11Q. Do you know Mr. Hammett, a revenue agent sitting here this morning?

A. I do.

12Q. Do you know whether or not he later prepared an official report in connection with the question of income arising from these sales?

A. I believe he did. I don't know whether Mr. Hammett prepared them or not.

13Q. Do you know whether or not a report was prepared?

A. Yes.

14Q. And that resulted eventually in an assessment of additional taxes which the Company has paid?

A. Yes, sir.

15Q. Those were taxes involved in this suit?

A. Yes, sir.

16Q. And those taxes in this suit arise from the question of whether income did result from the sale of 6,500 shares?

A. Yes.

66 (Discussion off the record.)

Mr. WHITE: I believe that concludes our case, Mr. Commissioner.

Commissioner COWEN: All right.

And does the government have any proof here, Mr. Rees?

Mr. REES: I would like to have the revenue agent sworn, please, and ask him one or more questions.

67 In the United States Court of Claims

No. 626-52

ANDERSON, CLAYTON & CO., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Houston, Texas
June 15, 1953,
Monday, at 10:45 a. m.

TESTIMONY FOR DEFENDANT IN REBUTTAL

The parties met, pursuant to agreement at the time above stated, in Room 616, Federal Office Building, Houston, Texas.

Present:

Hon. WILSON COWEN, Commissioner,
JOHN C. WHITE, ESQ., counsel for plaintiff;
JOHN A. REES, ESQ., counsel for defendant.

On order of reference by the Honorable, the United States Court of Claims, in the above entitled cause, testimony on behalf of the defendant in rebuttal was taken as follows:

(The reporter was previously sworn by the Commissioner.)

W. C. HAMMETT, a witness produced by the defendant, having first been duly sworn by the Commissioner, was examined, and in answer to interrogatories, testified as follows:

Commissioner COWEN: Mr. Hammett, state your name for the record.

The WITNESS: W. C. Hammett.

68 Commissioner COWEN: And Mr. Hammett, you are an agent of the—

The WITNESS: Internal Revenue Agent, 2740 Portsmouth.

Commissioner COWEN: All right, Mr. Rees.

DIRECT EXAMINATION.

By Mr. REES:

1Q. Mr. Hammett, the answer filed in this case in paragraph 4 states that a revenue agent, W. C. Hammett, prepared a typewritten report dated May 21, 1947, and that the report recommended a deficiency of $89.33786. Are you the gentleman who prepared that report?

A. I am.

2Q. Do you have that report before you?

A. I do.

3Q. Did you recommend the deficiency?

A. I recommended the deficiency, yes, sir.

4Q. Did that deficiency or additional tax result from your inclusion of any profit as income from the transaction in the 6,500 shares of common stock?

A. It did. Practically all of the deficiency resulted therefrom.

5Q. You have been present this morning and heard the testimony of witnesses and heard stipulations of counsel in the case?

A. I have.

69 6 Q. Is it—Is the deficiency which you recommended related to the same transactions that were discussed by the plaintiff's witnesses?

A. It is. There were other issues in the report, but that was the main issue.

7 Q. If you were now, today, preparing a new report or a revised report in this particular case and upon the knowledge that you have of the transactions as they have been presented to the Commissioner this morning, would your conclusion be the same or different from the conclusion that you set out in the report that you have before you?

A. It would definitely be the same.

8 Q. One other question, Mr. Hammett. I believe that actually the other issues in this report were those that resulted in a reduction in a deficiency attributable to this particular transaction.

A. That is correct.

Mr. REES: That is all.

Commissioner COWEN: All right, Mr. Hammett, you are excused.

(witness excused.)

Commissioner COWEN: Now, does the government have anything further?

Mr. REES: No, the government rests.

Commissioner COWEN: We will be in recess just a minute.

(short recess.)

Commissioner COWEN: Let the record show that all those
70 exhibits and the Plaintiff's No. 12 received in evidence, and that the proof of both parties in this case is closed.

(The documents above referred to, previously marked for identification as Plaintiff's Exhibits Nos. 7, 8, 9, 10, 11, and 12, are received in evidence under the same numbers.)

(Thereupon, at 10:55 a.m., the case was closed.)

71 Reporter's Certificate to foregoing transcript omitted in printing.

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PLAINTIFF'S EXHIBIT No. 1

Valuations of the Common Stock of Anderson, Clayton & Co. Under Stockholders Agreement

Date of Directors Meeting	Fiscal Year Ended July 31	
October 31, 1931	1931	$ 1.00
February 21, 1933	1932	1.00
October 4, 1933	1933	1.00
October 11, 1934	1934	1.0402
October 18, 1935	1935	1.00
May 14, 1937	1936	1.12
November 5, 1937	1937	13.02
October 21, 1938	1938	54.22*
October 25, 1939	1939	32.27
December 13, 1940	1940	33.62
December 9, 1941	1941	64.06
November 14, 1942	1942	79.60
November 30, 1943	1943	122.68
November 24, 1944	1944	140.43

* January 19, 1939 revised to $48.33.

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PLAINTIFF'S EXHIBIT No. 2

Transactions in Common Stock of Anderson, Clayton & Co.

Date	Purchased		Sold	
	Shares	Price[1]	Shares	Price
12-30-32	195	$ 1.00		
12-30-32			195	$ 1.00
6-13-34	2,600	1.00		
7-31-34			1,500	1.00
5- 1-35			1,100	1.00
12-15-39	18,574	48.33		
12-22-39			3,035	32.27
12-10-40	18	32.27		
12-27-40			1,000	33.62
7-31-41	1,275	33.62		
11-30-41	2,276	33.62		
1- 7-43	65	79.60		
1-14-43	300	79.60		
6-28-43	300	79.60		
12-18-43			6,500	112.68[2]

[1] Where provided interest was paid at the rate provided in the contract from the contract valuation date.

[2] Contract price $122.68 less $10.00 dividend paid prior to date of sale.

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PLAINTIFF'S EXHIBIT No. 3

Agreement Executed by the Corporation and the Holders of Its Common Stock, April 16, 1943.

75 THE STATE OF DELAWARE,
County of New Castle.

This AGREEMENT made and entered into by and between and among ANDERSON, CLAYTON & Co., a corporation incorporated under the laws of the State of Delaware, (hereinafter called "the corporation") nd the holders of its common stock outstanding on this date, for the purpose of modifying, reaffirming and continuing that certain trust and liquidation agreement heretofore entered into by and between Anderson, Clayton & Co., and the holders of its common stock, dated February 14, 1931, as amended and modified March 2, 1931, August 1, 1932, March 20, 1933, and October 20, 1933, so that the said agreement and amendments as herein modified, reaffirmed and continued shall, as a whole, hereafter read and be as follows, to-wit:

WITNESSETH:

I

The individual parties to this agreement, being the holders of all the common stock of said corporation, have heretofore delivered to D. B. Cannafax as trustee all of their respective shares of common stock of the corporation; endorsed in blank, to be held by said trustee from and after the date of such delivery until the first day of August, A.D. 1953, subject to the following covenants, agreements and conditions,—

(a) The said trustee or any successor trustee as herein provided for, shall issue a receipt to each stock holder whose stock is so deposited in the following form:

TRUSTEE'S RECEIPT

Receipt is acknowledged by the undersigned trustee of Certificate No. ——— for ——— shares of the common stock of Anderson, Clayton & Co., a Delaware corporation, issued in the name of ——— ——— and deposited by him, endorsed in blank, to be held in accordance with the provisions of
76 and subject to the terms and conditions of that certain agreement dated April 16, 1943, between Anderson, Clayton & Co., and the holders of its common stock.

Upon termination of the agreement and surrender of this receipt, certificate for the shares represented hereby and not theretofore transferred or purchased under the agreement will be delivered to the depositor.

Neither this receipt nor the shares for which it is issued may be negotiated, transferred or assigned except with the

written consent of the parties to said agreement as therein provided.

Dated this —— day of ——, 19——.

——————, Trustee.

(b) Except as herein provided, the individual parties hereto agree that they will not during the period covered by this agreement transfer or attempt to transfer and/or assign said stock held by said trustee or any part thereof or any interest therein, without the written consent of the corporation and the holders of at least seventy-five per cent of the stock held by the trustee under and by virtue of the terms of this agreement.

(c) If, during the period covered by this agreement, any stockholder, a party to this agreement, should die, all shares of common stock owned by such deceased party at the time of his death, and held by said trustee under the terms of this agreement, shall be purchased by the corporation for $1.00 per share plus the proportionate interest of said stock in the Common Stock Surplus and Participating Stock Surplus determined by the Board of Directors as of July 31st immediately preceding such death, plus four per cent (4%) per annum from such date to the date of death. In determining such proportionate interest there shall be excluded from the Common Stock Surplus the excess of cost of any shares of common stock held as treasury stock over $1.00 per share, and shares held as treasury stock shall be excluded from the total number of shares participating. In the event the deceased stockholder is indebted to the corporation, or any subsidiary thereof, the amount due hereunder shall be applied first to the payment or reduction of such indebtedness, and any remainder shall be paid to his estate in accordance with the following paragraph.

77 The corporation shall make payment for deceased party's stock in the following manner.—If the value of said stock determined in the manner hereinabove provided shall be less than $250,000.00, the whole of said amount shall be paid within six months after the death of said stockholder; if the value of said stock shall be more than $250,000.00, but not in excess of $500,000.00, $250,000.00 shall be paid within six months after the death of such deceased stockholder, and the remainder within twelve months after such death; if the value of said stock is in excess of $500,000.00, then $250,000.00 shall be paid within six months from the death of such stockholder and $250,000.00 each six months thereafter until the full amount is paid; provided, however, the corporation shall be permitted one full year (that is $500,000.00) in arrears without being adjudged in default, and that all deferred payments shall bear interest at the rate of four per cent (4%) per annum from date of death of such deceased stockholder until paid.

It is understood and agreed by and between the parties hereto that the aggregate of all sums which the corporation shall be required to pay under the terms hereof for the common stock of deceased and other stockholders purchased in accordance with this agreement, as hereinbefore and hereinafter provided, shall not exceed FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) annually and where such corporation owes at one time unpaid purchase money on the stock of two or more such parties such payments shall be apportioned to the payment of the stock of the respective parties in proportion to the amount at that time owing on the stock of such respective parties. The corporation, however, reserves the right to pay the entire amount due for the interest of any stockholder, or any part thereof, on or before the maturity date thereof.

(d) If the corporation and the owners of seventy-five per cent or more of the stock held by the trustee in accordance with the terms hereof shall make written request of a party to this agreement so to do, such party requested shall sell, assign and transfer to the corporation, or to such person or persons as may be designated in such request, all or any part of his stock
78 so held in trust upon such terms and conditions as may be agreed upon by him and the corporation, or the person or persons purchasing such stock, and, if parties are unable to agree, then the corporation shall purchase such stock at the price and upon the same terms and conditions as herein provided for the purchase of such stock in case of the death of such party. It is understood and agreed that if such stockholder is indebted to the corporation or any subsidiary thereof the purchase price of such stock shall be applied to such indebtedness to the extent thereof whether such stock is purchased by the corporation or sold to some other person with its consent.

(e) Any owner of the common stock held by the trustee under this agreement may elect to withdraw at the succeeding July 31st, by serving written notice of his desire to do so upon the trustee and the corporation not less than thirty days before such date. Signed resignations of any officer or directorship held in the corporation or any subsidiary thereof shall accompany the notice to the corporation. In such event the corporation shall purchase such stock at such price and upon such terms and conditions as shall be agreed upon between the withdrawing stockholder and the corporation; and in the event of their inability to agree, then the stock shall be purchased upon the same terms and conditions provided herein for the purchase of the stock of a deceased stockholder except that the price shall be the value reflected in the balance sheet for said succeeding July 31st. The purchase price of said stock shall be applied first to the payment of any indebt-

edness due by the seller to the corporation or any subsidiary thereof.

This provision shall be suspended during any period in which liquidation or dissolution is being actively considered by the directors or stockholders; and upon receipt of written notice of withdrawal of any stockholder, the directors of the corporation may and if as much as twenty-five per cent of the common stock outstanding is covered by such withdrawal notice or notices, shall, call a meeting of the stockholders within a reasonable time to consider the question of liquidation or dissolution; and no agree-
79 ment for the purchase of the stock of a withdrawing stockholder shall be concluded unless the stockholders decide against such liquidation or dissolution. If liquidation or dissolution is decided upon, then the common stock of the withdrawing stockholder shall receive the amount to which it is entitled under the certificate of incorporation.

This right shall also be suspended during any period in which purchase of the stock, if retired, would result in the impairment of the capital of the corporation.

II

All the individual parties hereto agree, bind and obligate themselves in the event it becomes necessary to do so to vote all shares of stock owned by them in the corporation, so as to authorize, empower and direct the officers of the corporation to carry out its part of this agreement. On all matters not incident in any way to this contract each individual party to this agreement shall be at liberty to cast the vote to which the stock owned by him and held in trust under the terms hereof is entitled in a manner deemed advisable by him.

III

The common stock of any of the parties hereto purchased by the corporation under the terms hereof may be sold and distributed to the remainder of the parties hereto or to any other person, firm or corporation in such manner and on such terms as may be agreed upon in writing by the corporation and the parties hereto owning at least seventy-five per cent of the remainder of said stock held by said trustee under and by virtue of the terms hereof.

IV

It is also agreed and understood that any future holder of common stock of the corporation shall become a party to this agreement by signing same or by a written acceptance of all of the provisions, terms, and conditions of same, and when same is
80 signed or so accepted by any future holder of the common stock he shall be considered an original party to this agree-

ment as though he were one of the holders of the common stock on the date of this agreement and one of the original signers of same, and this agreement shall be just as binding upon such stockholder and the stock delivered by him to the trustee, and upon the corporation, as though he were one of the original parties to this agreement. It is also agreed and understood by the parties hereto and all other persons hereafter becoming a party to this agreement that any common stock of the corporation hereafter acquired by any such party whether in the way of stock dividend, increase in capital stock, purchase or otherwise shall automatically be subject to the terms of this agreement, and that such party will forthwith endorse and deliver same to the trustee to be held under and subject to the terms hereof and the Secretary of the company in issuing any such stock is charged with the duty of seeing that this provision of agreement is complied with. It is further understood and agreed that no common stock will be issued or transferred by the corporation, until the holder to whom it is to be issued or transferred shall have signed, in duplicate, a written acceptance of the provisions, terms and conditions of this agreement in the following form:

STOCKHOLDERS ACCEPTANCE OF AGREEMENT

The undersigned hereby accepts and agrees to the provisions, terms and conditions of the agreement of April 16, 1943, between Anderson, Clayton & Co., and the holders of its common stock, and any amendments thereto adopted, and such agreement, and any amendments thereto, shall be binding upon the undersigned, his heirs and assigns.

Dated this —— day of ——, 19——.

_____,

Stockholder.

_____,

Witness.

V

The corporation and the owners of seventy-five per cent or more of the stock on deposit with the trustee may at any time
81 by instrument in writing signed by them remove the incumbent trustee and appoint a successor trustee; and in the event of the death, resignation, or disability of the trustee, the President of the corporation shall be the successor trustee hereunder until the corporation and the owners of seventy-five per cent or more of the stock on deposit have designated a successor trustee in writing. Any successor trustee shall succeed to all the

duties and obligations and be possessed of all the powers, rights and authority of the original trustee hereunder.

VI

This contract may be amended, altered, revised or cancelled at any time by an instrument in writing signed by the corporation and by individual parties hereto owning seventy-five per cent or more of the stock held by the trustee, as trustee under and by virtue of the terms of this agreement, but the said contract cannot be so altered or amended in any manner affecting the interests of a deceased stockholder.

VII

Wherever in this contract there occurs the expression "holders of seventy-five per cent of the stock held by the trustee" or words of similar import the expression shall be considered as embracing only those stockholders who have signed this agreement and other stockholders who have become additional parties to this agreement by signing the written acceptance thereof, and the expression shall not be construed as including the heirs, executors, administrators or personal representatives of any deceased stockholder whose stock is acquired by the corporation upon his death.

VIII

This agreement is executed in duplicate originals of equal dignity and it is agreed that one of same shall be kept by the trustee and the other shall be kept by the corporation; and it is further agreed that upon request of any stockholder, a party hereto, the Secretary of the corporation shall furnish one certified copy of this agreement, but only for the private and confidential use of such stockholder.

82-83 IX

This agreement is being executed under and in accordance with the provisions of paragraph VIII of aforesaid original agreement and when executed by the corporation and the parties owning at least seventy-five per cent of the common stock of said corporation held by the trustee as trustee under the terms of said original agreement, the same shall be substituted for said original agreement and shall become effective and binding on all parties owning said common stock so held by said trustee.

EXECUTED as of the 16th day of April, A. D. 1943.

Attest:
W. F. HIGGINS,
Secretary.

ANDERSON, CLAYTON & CO.
By W. H. KOAR,
President.

W. L. CLAYTON
H. WHITTINGTON
SYDNOR ODEN
J. M. JOHNSON
W. E. PARRY
A. N. HILBURN
C. T. DONLIN
WILLIAM J. JUNG
R. C. GREGG
C. C. HIGHTOWER
J. ROSS RICHARDSON
WALLACE FLEMING,
W. F. HIGGINS,
Atty.
PAUL J. FICHTER,
W. F. HIGGINS,
Atty.
T. O. SCHMID,
W. F. HIGGINS,
Atty.

LAMAR FLEMING, JR.
D. B. CANNAFAX
W. H. KOAR
JOHN C. WHITE
C. O. LAMBERTH
ALSTON CLAPP, SR.
J. P. FUESLER
W. LELAND ANDERSON
H. B. POTTS
FRANK C. ANDERSON,
JAMES E. ANDERSON
W. F. HIGGINS,
Atty.
FRED COCKRELL,
W. F. HIGGINS,
Atty.
C. S. RUFF,
W. F. HIGGINS,
Atty.
J. E. WADDELL,
W. F. HIGGINS,
Atty.

84 PLAINTIFF'S EXHIBIT NO. 4

CONSENT

WHEREAS Anderson, Clayton & Co., a corporation organized under the laws of Delaware, and the holders of its common stock are parties to that certain agreement dated April 16, 1943, governing the holding and disposition of the common stock of the corporation, and

WHEREAS paragraph (b) of Section I of said agreement provides:

> "Except as herein provided, the individual parties hereto agree that they will not during the period covered by this agreement transfer or attempt to transfer and/or assign said stock held by said trustee or any part thereof or any interest therein, without the written consent of the corporation and the holders of at least seventy-five per cent of the stock held by the trustee under and by virtue of the terms of this agreement."

NOW, THEREFORE, the undersigned Anderson, Clayton & Co., and the holders of more than seventy-five per cent of the common stock

of the corporation hereby confirm consent heretofore given to the sale and transfer out of the Treasury of the company of Six Thousand Five Hundred (6,500) shares of the common stock, as follows:

To:	H. Whittington	2,000 shares
	W. H. Koar	1,500 shares
	Sydnor Oden	1,250 shares
	J. M. Johnson	1,250 shares
	W. E. Parry	500 shares
		6,500 shares

SIGNED IN DUPLICATE ORIGINAL this 18th day of December, 1943.

ANDERSON, CLAYTON & CO.
By LAMAR FLEMING, JR.,
President.

W. L. CLAYTON
LAMAR FLEMING, JR.
H. WHITTINGTON
D. B. CAMAFAX
SYDNOR ODEN
W. H. KOAR
J. M. JOHNSON

Signed in duplicate original this 18th day of December, 1943.

W. L. CLAYTON
LAMAR FLEMING, JR.
H. WHITTINGTON
D. B. CANNAFAX.

ANDERSON, CLAYTON & CO.
By LAMAR FLEMING, JR.
President.

SYDNOR ODEN
W. H. KOAR
J. M. JOHNSON

85 PLAINTIFF'S EXHIBIT NO. 5

AGREEMENT OF MERGER

of

ANDERSON, CLAYTON & CO.,
a corporation of the State of California

INTO

ANDERSON, CLAYTON & CO.,
a corporation of the State of Delaware

Agreement of merger made and entered into this 16th day of September, A. D. 1943, by and between Anderson, Clayton & Co., a corporation organized and existing under the laws of the State of Delaware, party of the first part, and Anderson, Clayton & Co., a corporation organized and existing under the laws of the State of California, party of the second part.

Whereas, said Anderson, Clayton & Co., party of the first part, has heretofore been duly organized under and by virtue of the General Corporation Law of the State of Delaware, the certificate of incorporation of which corporation was filed in the office of the Secretary of State on the 31st day of December, 1929, and recorded in the office of the Recorder of Deeds for the County of New Castle on the 31st day of December, 1929, and amendments to which certificate of incorporation were filed in the office of the said Secretary of State and recorded in the office of said Recorder of Deeds on the following dates:

Filed		Recorded	
April	14, 1930	April	14, 1930
December	7, 1931	December	7, 1931
October	19, 1933	October	19, 1933
January	8, 1937	January	8, 1937
December	22, 1938	December	22, 1938

and certificates of retirement of ~~preferred stock~~ of which company were filed and recorded on March 17, 1933, January 12, 1935, January 29, 1937, August 1, 1938, and September 3, 1943, and a Certificate of Reduction of capital of which Company was filed and recorded on December 22, 1938; and

86 Whereas, the principal office of said Anderson, Clayton & Co., party of the first part, in the State of Delaware is located at No. 100 West Tenth Street, in the City of Wilmington, County of New Castle, and the name and address of its resident agent is ~~The Corporation Trust Company, No. 100 West Tenth~~ Street; in said City; and

Whereas, said party of the first part has an authorized capital stock consisting of Four Hundred Seventy Eight Thousand and Six (478,006) shares, divided into Three Hundred Thousand shares of Participating Four Per Cent Cumulative First Preferred Stock of the par value of One Hundred Dollars ($100) each, amounting in the aggregate to Thirty Million Dollars ($30,000,000), Seventy Five Thousand shares of Participating Four Per Cent Cumulative Second Preferred Stock having a par value of One Hundred Dollars ($100) per share, amounting in the aggregate to Seven Million Five Hundred Thousand Dollars ($7,500,000), One Hundred Fifty (150) shares of Five Per Cent Cumulative Second Preferred Stock having a par value of One Hundred Dollars ($100) per share, amounting in the aggregate to Fifteen Thousand Dollars ($15,000), and One Hundred Two Thousand Eight Hundred Fifty Six (102,856) shares of Common Stock without nominal or par value, of which capital stock Two Hundred Seventy Three Thousand Six Hundred Seventy Six (273,676) shares of Participating Four Per Cent

Cumulative First Preferred Stock, Fifty Four Thousand Five Hundred Eighty Seven (54,587) shares of Participating Four Per Cent Cumulative Second Preferred Stock, and One Hundred Two Thousand Eight Hundred and Fifty Six (102,856) shares of Common Stock are now issued and outstanding; and

Whereas, said Anderson, Clayton & Co., party of the second part, has heretofore been duly organized under and by virtue of the laws of the State of California, the Articles of Incorporation of which corporation were filed in the office of the Secretary of State on the 26th day of July, 1935, and

87 Whereas, said Anderson, Clayton & Co., party of the second part, has an authorized capital stock consisting of One Thousand (1,000) shares of Common Stock, having a par value of One Hundred Dollars ($100) per share, amounting in the aggregate to One Hundred Thousand Dollars ($100,000), of which capital stock One Thousand (1,000) shares are now issued and outstanding; and

Whereas, the principal office of said Anderson, Clayton & Co., party of the second part, in the State of California is in the City of Los Angeles, County of Los Angeles; and

Whereas, Anderson, Clayton & Co., party of the first part, is the owner of all of the outstanding stock of Anderson, Clayton & Co., party of the second part; and

Whereas, the Board of Directors of each of said corporations parties hereto, to the end that greater efficiency and economy in the management of the business carried on by each corporation may be accomplished, does deem it advisable and generally to the advantage and welfare of said corporations and their respective stockholders that such corporations merge into a single corporation under and pursuant to the provisions of the General Corporation Law of the State of Delaware;

Now, Therefore, in consideration of the premises and of the mutual covenants, agreements, provisions and grants hereinafter contained, it is hereby agreed by and between the parties hereto and in accordance with the General Corporation Law of the State of Delaware and the laws of the State of California, as follows:

(1) Said Anderson, Clayton & Co., party of the second part, shall be and the same is hereby merged into Anderson, Clayton & Co., party of the first part, which single surviving corporation is organized under the General Corporation Law of Delaware.

(2) The terms and conditions of such merger and the method of carrying same into effect and the manner of converting the shares of stock of said Anderson, Clayton & Co., party of the

second part, into shares of such surviving corporations are
88 as follows:

FIRST: The name of said surviving corporation (hereinafter termed the Corporation) is Anderson, Clayton & Co. The corporation shall be governed by the General Corporation Law of the State of Delaware.

SECOND: The principal office of the Corporation in the State of Delaware is to be located at No. 100 West Tenth Street, in the City of Wilmington, County of New Castle, and the name and address of its resident agent is The Corporation Trust Company, No. 100 West Tenth Street, Wilmington, Delaware.

THIRD: The nature of the business and the objects and purposes to be transacted, promoted or carried on by the Corporation are:

To purchase, sell, store, distribute, export and process cotton, cotton linters, cottonseed and cottonseed products in the United States and foreign countries and engage in any other activities related thereto;

To manufacture, purchase or otherwise acquire, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of, to invest, trade, deal in and deal with, goods, wares and merchandise and real and personal property of every class and description;

To subscribe for, purchase, acquire, hold, sell, exchange, pledge, hypothecate, or otherwise dispose of or deal in, the shares of stock, bonds, debentures, notes or other certificates or evidences of indebtedness, and obligations of any person, persons, firm, co-partnership or association, or of any private, public, quasi-public, or municipal corporation, domestic or foreign, or of any domestic or foreign state, government or governmental authority, or of any political or administrative subdivision or department thereof, and all trust, participation or other certificates of, or receipts evidencing interest in any such securities, and, while the owner of any such shares of stock, bonds, debentures, notes or other certificates or evidences of indebtedness or interest therein, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon for any and all purposes;

To buy, purchase, or otherwise acquire, and to hold, cancel, retire, re-issue, or otherwise dispose of the shares of the capital stock, bonds, debentures, notes and other obligations of this Corporation, from time to time, to such extent, at such price, and in such manner and upon such terms, as the board of directors of this Corporation shall from time to time determine, provided that shares of its own capital stock belonging to it shall not be voted directly or indirectly;

To apply for, purchase or in any manner to acquire, and to hold, own, use, and operate and to sell or in any manner dispose of, and to grant licenses and other rights in respect of, and in any manner deal with, any and all rights, inventions, improvements and processes used in connection with or secured under letters patent or copyrights of the United States, or other countries, or otherwise, or otherwise to work, operate or develop the same, and to carry on any business, manufacturing or otherwise, which may directly or indirectly effectuate these objects or any of them;

89 To purchase, lease or otherwise acquire and to hold, own, sell or dispose of real and personal property of all kinds and in particular lands, buildings, business concerns and undertakings, shares of stock, mortgages, bonds, debentures, notes and other securities, merchandise, book debts and claims, trademarks, trade names, patents and patent rights, copyrights and any interests in real or personal property;

To borrow money for its corporate purposes, and to make, accept, endorse, execute and issue promissory notes, bills of exchange, bonds, debentures or other obligations from time to time, for the purchase of property or for any purpose in or about the business of the Corporation, and, if deemed proper, to secure the payment of any such obligations by mortgage, pledge, deed of trust or otherwise;

To acquire (by purchase for cash, through issuance and/or exchange of securities, or otherwise) and to take over as a going concern and thereafter to carry on the business of any person, firm or corporation engaged in any business which this corporation is authorized to carry on, and in connection therewith, to acquire the good will and all or any of the assets and to assume or otherwise provide for all or any of the liabilities of any such business;

To sell, improve, manage, develop, lease, mortgage, dispose of or otherwise turn to account or deal with all or any part of the property of the Corporation;

To do all and every thing necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone, or in association with other corporations, firms, or individuals, and to do every other act or acts, thing or things incident or appurtenant to or growing out of or connected with the aforesaid business or powers or any part or parts thereof, provided the same be not inconsistent with the laws under which this Corporation is organized;

To have one or more offices, to carry on all or any of its

operations and business and without restriction or limit as to amount to purchase or otherwise acquire, hold, own, mortgage, sell, convey, or otherwise dispose of, real and personal property of every class and description in any of the States, Districts, Territories or Colonies of the United States, and in any and all foreign countries, subject to the laws of such State, District, Territory, Colony or Country.

To do any and all things herein set forth, and in addition such other acts and things as are necessary or convenient to the attainment of the purposes of this Corporation, or any of them, to the same extent as natural persons lawfully might or could do in any part of the world, insofar as such acts are permitted to be done by a corporation organized under the General Corporation Laws of the State of Delaware.

The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this Corporation and are in furtherance of, and in addition to, and not in limitation of the general powers conferred by the laws of the State of Delaware.

It is the intention hereof that the purposes, objects and powers specified in this Article Third and all subdivisions thereof shall, except as otherwise expressly provided, in no wise be limited or restricted by reference to or inference from the terms of any other clause or paragraph of this
90 Article, and that each of the purposes, objects and powers specified in this Article Third shall be regarded as independent purposes, objects and powers.

FOURTH: The total number of shares that may be issued by the Corporation is Four Hundred Seventy Seven Thousand Eight Hundred and Fifty Six (477,856) of which Three Hundred Thousand (300,000) shares of a par value of One Hundred Dollars ($100) per share, amounting in the aggregate to Thirty Million Dollars ($30,000,000), shall be designated Participating Four Per Cent Cumulative First Preferred Stock; Seventy Five Thousand (75,000) shares of a par value of One Hundred Dollars ($100) per share, amounting in the aggregate to Seven Million Five Hundred Thousand Dollars ($7,500,000), shall be designated Participating Four Per Cent Cumulative Second Preferred Stock; and One Hundred and Two Thousand Eight Hundred and Fifty Six (102,856) shares without nominal or par value shall be designated Common Stock. The powers, preferences and rights and the qualifications, limitations, or restrictions of the classes of stock

hereinbefore designated, the fixing of which by this agreement of merger is desired, are as follows:

The holders of Participating Four Per Cent Cumulative First Preferred Stock and the holders of Participating Four Per Cent Cumulative Second Preferred Stock shall be entitled to receive, payable when and as declared from the surplus or net profits of the Corporation, dividends at the rate of four per centum (4%) per annum, which shall accrue annually on the thirty first day of July; provided that no dividend shall be declared or paid on the Participating Four Per Cent Cumulative Second Preferred Stock except after all accrued cumulative dividends on Participating Four Per Cent Cumulative First Preferred Stock have been declared and paid, or provided for.

The dividends on the Participating Four Per Cent Cumulative First Preferred Stock and upon the Participating Four Per Cent Cumulative Second Preferred Stock shall be cumulative and shall be declared and paid or provided for before any dividends on
91 the Common Stock shall be declared, or paid, and if not declared and provided for as they accrue, there shall be added to the amount of such dividends a sum equivalent to interest thereon to the date payment is available at a rate per annum the same as the annual rate of dividend, compounded on each succeeding dividend payment date, so that, if in any year any part of the cumulative dividends on any preferred stock of any class shall not have been provided for, the deficiency plus an amount equivalent to interest as aforesaid shall be declared and paid, or provided for, before any dividends shall be declared or paid upon the Common Stock; and no dividends shall be declared or paid on Common Stock and no joint participating dividend as hereinafter defined shall be declared or paid on common and participating preferred stock unless the sum of the Common Stock Surplus and the Participating Stock Surplus, as hereinafter defined, remaining after any such dividend is deducted shall amount to ten per centum (10%) or more of the aggregate par value of all outstanding preferred stock.

The Corporation, by its Board of Directors, shall have the full right and opinion to pay all or any part of any cumulative preferred dividend on any class of preferred stock in additional stock of the same class at par, in lieu of cash dividends; provided that the proportion of such dividends paid in stock and cash, respectively, for any period shall be the same with respect to each of the several classes of the preferred stocks.

Whenever all cumulative dividends on all classes of the preferred stocks for all previous years, including any increase therein by reason of delayed payment, shall have been paid or provided for, in accordance with the provisions of this agreement of merger,

the Board of Directors may, subject to the limitations as to the surplus to be maintained for the protection of the preferred stocks, declare dividends on the Common Stock payable then or thereafter out of the Common Stock Surplus; and after such Common Stock Surplus has been paid out as dividends on Common Stock, then the Board of Directors may declare participating dividends on Common Stock and participating preferred stocks out of the Participating Stock Surplus as hereinafter provided.

92

The undistributed surplus of the Corporation shall be determined by the Board of Directors as of July 31st of each year after giving effect to all proper adjustments for the year ending on that date in the value of the assets of the Corporation and its subsidiaries, all earnings, gains and losses of both the Corporation and its subsidiaries for such year, and all reserves for imminent contingencies and hazards which the Board of Directors in its conclusive judgment may deem to be necessary in order fairly to state the surplus of the Corporation for such year, but no item of good will or going concern value shall be included in such calculation.

From the undistributed surplus for such year thus determined, an amount sufficient to pay all accrued unpaid cumulative dividends on preferred stocks, if any, shall first be deducted and set aside. From the remaining undistributed surplus, if any, there shall then be deducted an amount to be designated "Common Stock Surplus" for such year which shall be determined as follows:

The total undistributed surplus for the year ending July 31st, 1938, less any unpaid accrued dividends on preferred stocks on July 31st, 1938, shall constitute the Common Stock Surplus for the year 1938. To this Common Stock Surplus for the year 1938 there shall be added for each succeeding year an amount equal to

(1) Five Dollars per share on all Common Stock outstanding; and

(2) Four per centum per annum on the Common Stock Surplus for the preceding year, or if any dividend has been paid from such Common Stock Surplus, four per centum per annum on such surplus to the date of the dividend and four per centum per annum on the remaining balance thereafter, adjusted similarly for and as of the date of any additional dividend during the year.

After such annual additions have been made, there shall then be deducted a sum equal to all dividends paid, or provided for, on Common Stock exclusively on and after July 31st, 1938; and in the event the Corporation shall have purchased any of its outstanding Participating Four Per Cent Cumulative First Preferred Stock or its Participating Four

Percent Cumulative Second Preferred Stock during such year, any amount paid therefor in excess of its par value plus accrued cumulative dividends and its hereinafter defined pro rata share of any Participating Stock Surplus for the preceding year remaining undistributed on the date of purchase, shall be deducted therefrom, and any amount paid less than the value thus ascertained shall be added thereto.

93 The amount thus determined shall constitute and be designated as the "Common Stock Surplus" for the year for which it is determined.

Any remaining portion of such undistributed surplus for the year, after deduction of the Common Stock Surplus for such year, shall constitute and be designated as the "Participating Stock Surplus" for such year.

The Participating Stock Surplus for any year shall be available only for joint dividends on participating preferred and Common Stock, and whenever all cumulative dividends on preferred stock of all classes have been paid, or provided for, and when all the Common Stock Surplus for such year shall have been declared as dividends on the Common Stock and paid or provided for, the Board of Directors may, subject to any limitation as to the total surplus to be maintained for the protection of the preferred stocks declare participating dividends from such Participating Stock Surplus, and each share of Participating Four Per Cent Cumulative First Preferred Stock and Participating Four Per Cent Cumulative Second Preferred Stock shall, without preference or distinction between such classes for this purpose, be entitled to its pro rata share of one-half of any such participating dividend when declared, limited, however, to 1/660,000th of the total participating dividend, and each share of Common Stock shall be entitled to its proportionate part of the remainder of such participating dividend.

The action of the Board of Directors in determining the undistributed surplus, the "Common Stock Surplus" and the "Participating Stock Surplus" for any year shall be final and conclusive on all stockholders.

The amount of the authorized stock of the Corporation of any class or classes may be increased or decreased only by an amendment to this agreement adopted by the affirmative vote of the holders of a majority of the stock of the Corporation entitled to vote, provided further that the holders of a majority of the class of stock sought to be increased or decreased, and in the case of any increase in common stock, the holders of a majority of Participating Four Per Cent Cumulative First Preferred Stock and

94 the holders of a majority of the Participating Four Per Cent Cumulative Second Preferred Stock vote affirmatively for such increase or decrease.

The Participating Four Per Cent Cumulative First Preferred and the Participating Four Per Cent Cumulative Second Preferred Stock shall not be subject to redemption.

In the event of any liquidation or dissolution or winding up (either voluntary or involuntary) of the Corporation, the holders of the Participating Four Per Cent Cumulative First Preferred Stock shall be entitled to be paid in full, both the par amount of their shares and the unpaid dividends, including any increase therein by reason of delayed payment, accrued therein before any amount shall be paid to the holders of the Participating Four Per Cent Cumulative Second Preferred Stock or the Common Stock; and the holders of the Participating Four Per Cent Cumulative Second Preferred Stock shall be entitled to be paid in full, both the amount of their shares and the unpaid dividends, including any increase therein by reason of delayed payment, accrued thereon, before any amount shall be paid to the Common Stock; and when the par value and all such accrued cumulative dividends on the preferred stock of all classes shall have been paid the directors shall forthwith determine, in accordance with the provisions hereinabove set out, the Common Stock Surplus as of the date such liquidation, dissolution or winding up was determined upon, and the remaining assets to the extent of the sum of such Common Stock Surplus and the capital in respect of the Common Stock, $1.00 per share, shall be distributed pro rata among the holders of Common Stock; and when the holders of Common Stock have been paid an amount equal to $1.00 per share and such Common Stock Surplus, all remaining assets shall be distributed to holders of the participating preferred and Common Stock in the same manner and method as provided hereinabove for joint participating dividends.

The Participating Four Per Cent Cumulative First Preferred Stock, the Participating Four Per Cent Cumulative Second Preferred Stock and the Common Stock shall have equal voting rights, share for share.

95 Shares of Common Stock of the Corporation, without par value, at any time authorized to be issued, may be issued by the Corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors of the Corporation and to such persons, firms and/or other corporations as the Board of Directors in its discretion may designate.

All persons who shall acquire stock in the Corporation shall acquire it subject to the provisions of this agreement.

So far as not otherwise expressly provided by the laws of the State of Delaware, the Corporation shall be entitled to treat the persons in whose names any shares are registered as the owners thereof for all purposes and shall not be bound to recognize any equitable or other claims to or interest in such shares on the part

of any other persons whether or not the Corporation shall have notice thereof.

No stockholder shall be entitled as a matter of right to subscribe for or receive additional shares of any class of stock of the Corporation whether now or hereafter authorized or any bonds, debentures, or other securities convertible into stock, but such additional shares of stock or other securities convertible into stock may be issued or disposed of by the Board of Directors to such persons and on such terms as in its discretion it shall deem advisable.

The minimum amount of capital with which the Corporation will commence business is One Thousand Dollars ($1,000.00).

FIFTH: The Corporation is to have perpetual existence.

SIXTH: The private property of the stockholders of this Corporation shall not be subject to the payment of corporate debts to any extent whatever.

SEVENTH: The number of directors of this Corporation which shall constitute the whole board shall be such as from time to time shall be fixed by, or in the manner provided in, the by-laws of the Corporation, but in no case shall the number be less than three. Directors need not be stockholders. In case of any increase in the number of directors, the additional directors may be elected by the Board of Directors to hold office until the next annual meeting of the stockholders and until their successors are elected and qualified. In case of vacancies in the Board of Directors, the Board of Directors may elect directors to fill such vacancies. Except where specifically requested by the holders of at least twenty per cent. (20%) of the outstanding stock entitled to vote at any stockholders' meeting for the election of directors, or by at least two (2) directors in the case of an election of directors by the Board of Directors, elections of directors need not be by ballot, but may be upon the oral expression of the persons participating in such meeting.

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EIGHTH: In furtherance and not in limitation of the powers conferred by statute the Board of Directors is expressly authorized:

(a) To fix, determine and vary from time to time the amount to be maintained as surplus and the amount or amounts to be set apart as working capital.

(b) To set apart out of any of the funds of the Corporation available for dividends a reserve or reserves for any proper purpose and/or to abolish any such reserve in the manner in which it was created.

(c) Without any action on the part of the stockholders to make, amend, alter, change, add to or repeal by-laws for the Corporation. The by-laws made by the directors may be

amended; altered, changed, added to or repealed by the stockholders.

(d) Without any action on the part of the stockholders to authorize and cause to be executed and delivered bonds; debentures, notes or other certificates or evidences of indebtedness of the Corporation without limit as to amount and similarly to authorize and cause to be executed and delivered mortgages and liens without limit as to amount, upon the real and personal property of the Corporation.

(e) From time to time to determine whether and to what extent, at what time and place, and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of any stockholder; and no stockholder shall have any right to inspect any account or book or document of the Corporation except as conferred by statute or by-laws or as authorized by a resolution of the stockholders or Board of Directors.

(f) To sell, assign, convey or otherwise dispose of a part of the property, assets and effects of this Corporation less than the whole or less than substantially the whole thereof, on such terms and conditions as shall be deemed advisable, without the assent of the stockholders in writing or otherwise; and also to sell, assign, transfer, convey and otherwise dispose of the whole or substantially the whole of the property, assets, effects, franchises and good-will of this Corporation on
97 such terms and conditions as they shall deem advisable, but only with the assent in writing or pursuant to the affirmative vote of the holders of not less than a majority of all of the shares of stock issued and outstanding and having voting power at the time such assent is required.

(g) All of the powers of this Corporation, insofar as the same lawfully may be vested by this agreement in the Board of Directors and except as otherwise provided herein, are hereby conferred upon the Board of Directors of this Corporation.

NINTH: In the absence of fraud, no contract or transaction between the Corporation and any other association or corporation shall be affected by the fact that any of the directors or officers of the Corporation are interested in or are directors or officers of such other association or corporation, and any director or officer of the Corporation individually may be a party to, or may be interested in, any such contract or transaction of the Corporation; and no such contract or transaction of the Corporation with any person or persons, firm, association or corporation, shall be affected by the fact that any director or officer of the Corporation is a party

to, or interested in, such contract or transaction, or in any way connected with such person or persons, firm, association or corporation; and each and every person who may become a director or officer of the Corporation is hereby relieved from any liability that might otherwise exist from thus contracting with the Corporation for the benefit of himself or any person, firm, association or corporation in which he may be in anywise interested.

TENTH: Except where other notice is specially required by statute, written notice of any stockholders' meeting given as provided in the by-laws shall be sufficient without publication or other form of notice, and such written notice need be given only to the holders of stock entitled to vote at such meeting. Whenever any notice whatever is required to be given under the provisions of Chapter 65 of the Revised Code of Delaware, or under the provisions of this agreement or by-laws of the Corporation, a waiver thereof in writing, signed by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto.

98 ELEVENTH: If the by-laws so provide, both stockholders and directors of this Corporation shall have power to hold their meetings either within or without the State of Delaware; and, except as otherwise provided by statute, the books of the Corporation may be kept outside of the State of Delaware at such place or places as may be from time to time designated by the Board of Directors.

TWELFTH: The Corporation may in its by-laws make any other provisions or requirements for the management or conduct of the business of the Corporation, provided the same be not inconsistent with the provisions of this agreement, or contrary to the laws of the State of Delaware or of the United States.

THIRTEENTH: The Corporation reserves the right to amend, alter, change, add to or repeal any provision contained in this agreement in the manner now or hereafter prescribed by statute, and all rights conferred on officers, directors and stockholders herein are granted subject to this reservation.

FOURTEENTH: The total amount of the stock of the Corporation to be issued for the stock of Anderson, Clayton & Co., party of the first part, is none. The shares of such party of the first part are not to be converted, but shall continue without change as shares of the Corporation.

The total amount of the stock of the Corporation to be issued for stock of Anderson, Clayton & Co., party of the second part, is none, and the shares of the party of the second part shall be deemed to be cancelled on the effective date of the merger under the terms of which the party of the first part, as owner of all outstanding shares of party of the second part, will receive all of its

assets and assume all of its liabilities in cancellation and redemption of such stock and in lieu of any shares of the Corporation.

FIFTEENTH: The by-laws of Anderson, Clayton & Co., party of the first part, shall remain and be the by-laws of the Corporation until the same shall be altered or amended according to the provisions thereof, either by the Board of Directors or by the stockholders of the Corporation. The Board of Directors of the Corporation shall have power to make and alter the by-laws of the Corporation.

99 The number of directors of the Corporation which shall constitute the whole board shall be fixed by, or in the manner provided in, the by-laws. The first Board of Directors, after the filing and recording of this agreement, shall be thirteen (13) in number, and the names and places of residence of such first directors, who shall hold office until their respective successors have been elected and qualified, are as follows:

Names	Places of Residence
Dudley B. Cannefax	Houston, Texas
Jacob C. Dellinger	Los Angeles, California
Lamar Fleming, Jr.	Houston, Texas
John H. Freeman	Houston, Texas
John P. Fuesler	Houston, Texas
Russell C. Gregg	Memphis, Tennessee
John M. Johnson	Houston, Texas
William H. Koar	New York, New York
George A. Levy	Atlanta, Georgia
Sydnor Oden	Houston, Texas
J. Ross Richardson	Houston, Texas
DeFord Sumners	Houston, Texas
Harmon Whittington	Houston, Texas

The names, title and places of residence of the first officers, after the filing and recording of this agreement, who shall hold office until their respective successors shall have been elected and qualified or otherwise, as provided in the by-laws of the Corporation shall be as follows:

Name of Officers	Title	Places of Residence
Lamar Fleming, Jr.	President	Houston, Texas
Harmon Whittington	Vice-President	Houston, Texas
Dudley B. Cannafax	Vice-President and Treasurer	Houston, Texas
William H. Koar	Vice-President	New York, New York
John P. Fuesler	Vice-President	Houston, Texas
Sydnor Oden	Vice-President	Houston, Texas
John M. Johnson	Vice-President	Houston, Texas
DeFord Sumners	Secretary	Houston, Texas
William E. Parry	Controller and Asst. Treasurer	Houston, Texas
Allen N. Hilburn	Asst. Secretary	Houston, Texas
William F. Higgins	Asst. Secretary and Asst. Treas.	New York, New York

SIXTEENTH: The Corporation shall pay all expenses of carrying this agreement into effect and of accomplishing the merger.

If at any time the Corporation shall consider or be advised that any further assignments or assurances in the law or any things are necessary or desirable to vest in the Corporation, according to the terms hereof, the title to any property, rights, privileges or franchises of Anderson, Clayton & Co., party of the second part, the proper officers and directors of Anderson, Clayton & Co., party of the second part, shall and will execute and make all such proper assignments and assurances in the law and do all things necessary or proper to vest in and confirm to the Corporation title and possession of all such property, rights, privileges and franchises and otherwise to carry out the purposes of this agreement.

SEVENTEENTH: When this agreement shall have been approved, signed, acknowledged, filed and recorded, as required by law, the separate existence of said Anderson, Clayton & Co., party of the second part, shall cease and said corporation shall be merged into Anderson, Clayton & Co., party of the first part, in accordance with this agreement, Anderson, Clayton & Co., party of the first part, possessing all the rights, privileges, powers and franchises as well of a public nature as of a private nature, and being subject to all the restrictions, disabilities and duties of said corporation so merged, and all and singular the rights, privileges, powers and franchises of said corporation, and all property, real, personal and mixed, and all debts due to said corporation on whatever account, as well for stock subscriptions as all other things in action or belonging to said corporation, shall be vested in the continuing Corporation; and all property, rights, privileges, powers and franchises, and
101 all and every other interest shall be thereafter as effectually the property of the continuing Corporation as they were of the constitutent corporation, and the title to any real estate, whether vested by deed or otherwise, vested in said corporation shall not revert or be in any manner impaired by reason of said merger; provided, that all rights of creditors and all liens upon any property of said corporation shall be preserved unimpaired, and all debts, liabilities and duties of said constitutent corporation shall thence forth attach to the continuing Corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

EIGHTEENTH: This agreement shall become effective when filed in the office of the Secretary of State of Delaware as required by the General Corporation Law of the State of Delaware, and filed in the office of the Secretary of State of California as required by the laws of the State of California.

IN WITNESS WHEREOF a majority of the directors of Anderson, Clayton & Co., a corporation of the State of Delaware, and a

majority of the directors of Anderson, Clayton & Co., a corporation of the State of California, have this 16th day of September, 1943, signed this Agreement and Act of Merger under the corporate seals of said respective corporations.

(Signed) J. M. Johnson, Jno. H. Freeman, Lamar Fleming, Jr., J. Ross Richardson, D. B. Cannafax, H. Whittington, Sydnor Oden, J. P. Fuesler, D. Sumners, being a majority of the directors of Anderson, Clayton & Co., organized under the laws of the State of Delaware.

Signed, sealed and delivered in the presence of: Pauline Kampner

ANDERSON, CLAYTON & Co., Corporate Seal, Delaware, 1929.

102 (Signed) J. C. Dellinger, Geo. Cleveland, R. L. Lesnett, D. B. Cannafax, Lamar Fleming, Jr., D. Sumners, being a majority of the directors of Anderson, Clayton & Co., organized under the laws of the State of California.

Signed, sealed and delivered in the presence of: G. D. Hindman and Pauline Kampner.

ANDERSON, CLAYTON & Co. Corporate Seal, California, 1935.

IN FURTHER WITNESS WHEREOF, this Agreement of Merger, having been approved by resolution of the Board of Directors of Anderson, Clayton & Co., party of the first part, a corporation organized and existing under the laws of the State of Delaware, the said corporation has caused this agreement to be signed by its President and its Secretary under its corporate seal.

ANDERSON, CLAYTON & Co.

By LAMAR FLEMING, JR.,

President.

By D. SUMNERS,

Secretary.

ANDERSON, CLAYTON & Co. Corporate Seal, Delaware, 1929.

IN FURTHER WITNESS WHEREOF, this Agreement of Merger, having been approved by resolution of the Board of Directors of Anderson, Clayton & Co., party of the second part, a corporation organized and existing under the laws of the State of California, the said corporation has caused this agreement to be signed by its President and its Secretary under its corporate seal.

ANDERSON, CLAYTON & Co.

By J. C. DELLINGER,

President.

By L. J. BRUNGS,

Secretary.

ANDERSON, CLAYTON & Co. Corporate Seal, California, 1935.

103 I. D. SUMNERS, Secretary of ANDERSON, CLAYTON & Co., a corporation of the State of Delaware, hereby certify, as such secretary and under the seal of that corporation, that the Agreement of Merger to which this certificate is attached, after having been first duly signed by a majority of the directors of said corporation, as required by the provisions of the General Corporation Law of Delaware, and approved by resolution of the board of directors and signed by the president and the secretary of ANDERSON, CLAYTON & Co., a corporation of the State of California, was duly submitted to the stockholders of said ANDERSON, CLAYTON & Co. (Delaware Corporation), at a special meeting of said stockholders called separately for the purpose of considering and taking action upon said Agreement of Merger and held after due notice, on the 18th day of September, 1943, that more than two-thirds of the total number of shares of the outstanding capital stock of said ANDERSON, CLAYTON & Co., (Delaware Corporation), was represented at said meeting, and that at said meeting the votes of the stockholders of said ANDERSON, CLAYTON & Co., (Delaware Corporation), representing more than two-thirds of the total number of shares of its outstanding capital stock were cast, by ballot, in favor of the adoption of said Agreement of Merger, which Agreement of Merger was thereby at said meeting duly adopted as the act of the stockholders of said ANDERSON, CLAYTON & Co., (Delaware Corporation).

WITNESS my hand and the seal of said ANDERSON, CLAYTON & Co., (Delaware Corporation), on this 20th day of September, 1943.

D. SUMNERS,
Secretary.

ANDERSON, CLAYTON & Co. Corporate Seal, Delaware, 1929.

104 CERTIFICATE OF PRESIDENT AND SECRETARY OF ANDERSON, CLAYTON & CO.

A Corporation of the State of California,
Showing Approval of Agreement of Merger

We, J. C. DELLINGER, president, and L. J. BRUNGS, secretary, of ANDERSON, CLAYTON & Co., a corporation duly organized and existing under the laws of the State of California, do hereby certify:

1. That a meeting of the Board of Directors of said corporation was held at Los Angeles, California, on the 21st day of August, 1943, for the purpose of considering the advisability of approving a proposed merger of the said corporation into ANDERSON, CLAYTON & Co., a corporation of the State of Delaware.

2. That at said meeting of the Board of Directors, the following resolution, approving the said merger, was adopted:

WHEREAS, a plan for the complete liquidation and merger of the corporation into Anderson, Clayton & Co., (Delaware) has been adopted by such company and this corporation, and provides for the transfer of all the property of this corporation, subject to its liabilities, to such company in cancelation and redemption of all its capital stock, and in lieu of shares of stock of the continuing corporation.

RESOLVED that in the judgment of this Board of Directors it is advisable and for the best interests of this corporation that it be merged into ANDERSON, CLAYTON & CO., a corporation organized and existing under the laws of the State of Delaware, and

FURTHER RESOLVED that the draft of the Agreement of Merger providing for the merger of this corporation into said ANDERSON, CLAYTON & CO. be and it hereby is approved and the president (or vice-president) and the secretary (or assistant secretary) be and they hereby are authorized and directed to sign and acknowledge the Agreement of Merger submitted to this meeting on behalf of this corporation.

3. That three directors voted in favor of said resolution and no directors voted against said resolution.

4. That on the 24th day of August, 1943, the secretary
105 of this corporation mailed to each holder of record of every class of stock of this corporation (whether or not their voting rights were restricted or denied by the articles of incorporation) notice of a special meeting of the stockholders of the corporation to consider the advisability of approving the proposed merger of this corporation into ANDERSON, CLAYTON & CO., a corporation organized and existing under the laws of the State of Delaware; to which notice was attached a statement of the terms and conditions of the proposed Agreement of Merger.

5. That the special meeting of the stockholders of this corporation to consider the advisability of approving the proposed Agreement of Merger, merging this corporation into ANDERSON, CLAYTON & CO., a corporation of the State of Delaware, was held at Los Angeles, California, on the 18th day of September, 1943, and that the said Agreement of Merger was approved by the affirmative vote of the holders of One Thousand (1,000) Shares of Common Stock, being the holders of more than two-thirds of the issued and outstanding shares of each class, whether or not their right to vote be restricted or denied by the articles of incorporation fo the corporation.

6. At the time of the holding of the special meeting of stock-

holders called for the purpose of considering the advisability of approving the proposed merger, there were issued and outstanding One Thousand (1,000) Shares of Common Stock.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed hereto the corporate seal this 18th day of September, 1943.

J. C. DELLINGER,
President of ANDERSON, CLAYTON & Co.,
L. J. BRUNGS,
Secretary of ANDERSON, CLAYTON & Co.

Corporate Seal.

106 STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 18th day of September, 1943, before me personally came J. C. DELLINGER and L. J. BRUNGS, to me known, who, being by me duly and severally sworn, each for himself, deposes and says: That he, the said J. C. DELLINGER, is president and that he, the said L. J. BRUNGS, is secretary of ANDERSON, CLAYTON & Co., a corporation organized and existing under the laws of the State of California, and that the facts set forth in the foregoing certificate are, in all respects, true and correct.

(S.) J. C. DELLINGER,
(S.) L. J. BRUNGS.

Subscribed and sworn to before me this 18th day of September, 1943.

———————,
Notary Public.

My Commission Expires October 26, 1945.

107 THE ABOVE AGREEMENT OF MERGER, having been executed by a majority of the Board of Directors of ANDERSON, CLAYTON & Co., a corporation organized and existing under and by virtue of the laws of the State of Delaware (and having been executed by the other corporate party thereto in the manner prescribed by the laws of the state under which it was organized) and having been adopted separatedly by the stockholders of each corporate party thereto, as to said ANDERSON, CLAYTON & Co. (Delaware Corporation), in accordance with the provisions of Section 59 of the General Corporation Law of the State of Delaware, and as to said ANDERSON, CLAYTON & Co. (California Corporation) in accordance with the provisions of the Civil Code of California in that behalf, and that fact having been certified by the secretary of each corporate party thereto, the president and secretary of said ANDERSON, CLAYTON & Co. (Delaware Corporation) do now hereby execute the said Agreement of Merger under its corporate seal, by

authority of the directors and stockholders thereof, as the act, deed and agreement of said corporation, on this 20th day of September, 1943.

ANDERSON, CLAYTON & CO.,
LAMAR FLEMING, JR., *President.*
D. SUMNERS, *Secretary.*

ANDERSON, CLAYTON & CO.
Corporate Seal
Delaware
1929

Attest:
D. SUMNERS,
Secretary.

108 STATE OF TEXAS,
County of Harris, ss:

BE IT REMEMBERED, that on this 20th day of September, A. D. 1943, personally came before me R. M. Bleike, a Notary Public, in and for the county and state aforesaid, LAMAR FLEMING, JR., president of ANDERSON, CLAYTON & CO., a corporation organized and existing under and by virtue of the laws of the State of Delaware, and one of the corporations described in and which executed the foregoing Agreement of Merger, known to me personally to be such, and he the said LAMAR FLEMING, JR., as such president duly executed said Agreement of Merger before me and acknowledged said Agreement of Merger to be the act, deed and agreement of said ANDERSON, CLAYTON & CO., that the signatures of the said president and the secretary of said corporation to said foregoing Agreement of Merger are in the handwriting of said president and secretary of said ANDERSON, CLAYTON & CO., and that the seal affixed to said Agreement of Merger is the common corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office the day and year aforesaid.

R. M. BLEIKE,
Notary Public, in and for Harris County, Texas.

My Commission Expires June 1, 1945.

NOTARY PUBLIC,
County of Harris, Texas.

Here follows 1 photolithograph, side folio 109

704

State of Delaware

Office of Secretary of State

I, William J. Storey, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Agreement of Merger between "ANDERSON, CLAYTON & CO." a corporation organized and existing under the laws of the State of California and "ANDERSON, CLAYTON & CO.", a corporation organized and existing under the laws of the State of Delaware, under the name of "ANDERSON, CLAYTON & CO." as received and filed in this office the twenty-seventh day of September, A. D. 1943, at 9 o'clock A.M.

And I do hereby further certify that the aforesaid Corporation shall be governed by the Laws of the State of Delaware.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover this twenty-seventh day of September in the year of our Lord one thousand nine hundred and forty-three.

William J. Storey
Secretary of State

110 PLAINTIFF'S EXHIBIT NO. 6

MINUTES OF MEETING OF DIRECTORS
OF ANDERSON, CLAYTON & CO.
November 30, 1943

A special meeting of the Board of Directors of Anderson, Clayton & Co. was held in the office of the company, Cotton Exchange Building, Houston, Texas, on November 30, 1943, at 10:00 o'clock a. m., pursuant to notice thereof duly and regularly given to all directors.

The following directors were present:

D. B. Cannafax	Sydnor Oden
Lamar Fleming, Jr.	J. Ross Richardson
Jno. H. Freeman	D. Sumners
J. P. Fuesler	Harmon Whittington
J. M. Johnson	

Lamar Fleming, Jr., President of the corporation, acted as chairman of the meeting, and D. Sumners, Secretary of the corporation, acted as secretary of the meeting.

The President stated that one of the purposes of the meeting was to consider the matter of declaring a dividend upon the common stock of the corporation, and that before the matter was acted upon he desired to bring certain facts to the attention of the directors, believing that such facts should be considered in connection with the dividend matter. He then presented the following statement:

"One of the purposes of this meeting is to decide what, if any, dividends to declare on the common stock. We all will agree this question must be approached with even greater delicacy, now that our corporation is the operating and borrowing entity, than was the case when the joint stock association and not the corporation was the borrower from banks. At least theoretically, the common dividends passed, except only for a small fraction, into the hands of persons having individual liability to creditors, as shareholders of the joint stock association; whereas, since the corporation has been substituted as the borrower, the total amount of the dividends is now subtracted from the aggregate assets available to creditors.

"When we discussed our plans for the merger with our bankers and the withdrawal of the personal liabilities which would result from the substitution of an incorporate borrower, they gave their approval to the entire reorganization and consented to extend to the corporation the same credit accommodations which they had been making available to the joint stock association. This cooperative attitude, however, was premised upon

the assumption that the change in corporate status would not affect the continuity of our policies, particularly with regard to the protection of those from whom we borrow. At several banks, it was mentioned specifically that their attitude toward us presupposed a reasonable and conservative dividend policy.

111 "I think the facts before us are as follows:

"(1) The combined earnings for the year ended July 31, 1943, of the corporation and the two subsidiaries, i. e., the joint stock association and the California corporation, which were merged into it immediately after the close of the year, amounted to about $3,900,000 after payment of approximately $1,724,000 of income taxes. Of this amount, about $1,700,000 was derived from cotton merchandising and about $2,200,000 from dividends and interest received principally from subsidiaries of the joint stock association.

"(2) The net current position, which the Banks regard as of first importance in considering credit accommodations to us, was increased $1,419,000 after payment of about $1,307,000 dividends on the preferred.

"(3) The prospects for operating results this season are unfavorable.

"We do not dare take a long basis position in cotton merchandising, hedged by sales of distant futures deliveries, which are at a discount, since that would add the discounts to the other carrying costs of interest, insurance, and storage. We have found it impossible to take the reverse position, short of the basis at premiums which we would be willing to accept, due to a general policy on the part of the mills to restrict their forward commitments. So we are just trying to do a turnover business, which is difficult in the face of discounts.

"The oil mill subsidiaries are in a less favorable situation than last year, due to the fact that the 1943 Commodity Credit Corporation Program has narrowed the margin between seed prices and products prices, notwithstanding the gradual increase in cost of processing. In the case of our mills, the unit cost of processing is further enhanced by the reduced crops in West Texas, West Oklahoma, and California, and Arizona.

"The prospects for our compress companies also are unfavorable. Many of their operations are being done at a loss, due principally to ceilings on charges and the limited availability of labor, in order to keep our and other customers' cotton business operating.

"(4) The market risks of our cotton business are greatly augmented by the breakdown of the hedging system which has resulted from present abnormal conditions. Experience by now has proved that the effectiveness of a futures hedge and a regime of Government floors and ceilings simply do not get along together. We thus have been compelled reluctantly to forego the use of hedges on a considerable portion of our stocks, particularly those qualities whose values are related more to loan rates than futures prices. Of course, we have explained this development to the Banks, who obviously cannot regard loans to us on unhedged cotton to be as well secured as the old-time loans on hedged cotton." From our point of
112 view, we must recognize the greater hazard entailed in unhedged business and the possibility that we might suffer a serious depreciation in inventory values, particularly in the event of a sudden termination of the War.

"(5) We are financing our South American subsidiaries in carrying very large stocks of cotton, of a value in excess of half our net current assets. These stocks are unhedgeable. The bulk of them is in Brazil, and eventual liquidation into dollars depends upon permits of the Brazilian Exchange Control and upon the possibility of selling the cotton in a free currency, as contrasted to blocked sterling or other blocked currency. Our American banks do not regard cotton in Brazil as first-class collateral, for the foregoing and other reasons.

"We discussed this heavy engagement in South American cotton with our banks last summer. Generally they considered the operation sound, although we did meet with some criticism of it; but it was contemplated by them and ourselves at the time that there would be a gradual liquidation, which would reduce the commitment to much smaller figures before the commencement of new crop movement next April. Thus far, we have been disappointed in this liquidation and we must recognize a serious probability that we will go into the South American new crop with very large stocks from prior crops. This would necessitate our arranging much larger banking facilities before next spring for South American cotton, which the banks do not regard as first-class security, or else would compel our South American subsidiaries to curtail their operations of merchandising, ginning, and crushing. The latter alternative must be avoided, if possible, not only for profit-and-loss considerations, but also because it would be most serious to our good will in those countries to curtail our services at a time when they are most needed.

"(6) Generally we face the uncertainties inherent in the closing chapters of the greatest war in history, and cannot

presume to foresee the needs for liquid capital with which we may be confronted.

"I think we all would like to declare a common dividend sufficient to bring to a current basis the payments of $5.00 per share per year which are contemplated in the 1938 amendment to the charter, that is to pay now $10.00 per common share. Those of us who have discussed the matter were at first in some doubt whether the payment of such a dividend would be fully warranted under the circumstances which I have attempted to describe and in our first year of borrowing as a corporation. Therefore, Mr. Cannafax, Mr. Koa, and I recently made the occasion to go into this matter and our whole situation with our principal bankers; and I am glad to say that it is with their approval that we recommend a $10.00 dividend on the common stock."

Following some discussion, upon motion by Director Fuesler, seconded by Director Freeman, the following resolution was unanimously adopted, viz:

113 RESOLVED, that a dividend of Ten Dollars ($10.00) per share on the common stock of the corporation, payable immediately to stockholders of record at the close of business on November 29, 1943, be, and the same is, hereby declared.

The President stated that another purpose of the meeting was to consider and determine the undistributed surplus of the corporation as of July 31, 1943, and the division of such surplus into common stock surplus and participating stock surplus, all as provided to be done by the charter of the corporation. The Treasurer then presented a balance sheet and statement which had been made up under his direction, and explained to the directors the adjustments for the fiscal year that had been made in values of assets of the corporation and its subsidiaries, the reasons for the various reserves that had been set up in the balance sheet, and generally the matters that had been taken into account fairly to state the surplus of the corporation for the fiscal year closing July 31, 1943. The statement attached to the balance sheet allocated the surplus shown to the common stock surplus and the participating stock surplus, as provided by the charter of the corporation. The balance sheet and statement submitted were as follows:

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Anderson, Clayton & Co.
(A Delaware Corporation)

Balance Sheet—July 31, 1943

(Giving effect to merger into that corporation of subsidiaries, Anderson, Clayton & Co., a Texas joint stock association, and Anderson, Clayton & Co., a California Corporation.)

Assets

Current Assets:		
Cash in banks		$ 4,349,682.72
U. S. Treasury bonds at cost:		
Pledged to banks	$ 1,050,000.00	
Deposited as margins on cotton futures	718,775.00	1,768,775.00
Certificates of interest in cotton producers' notes, pledged to banks		8,351,800.00
Cotton documents in process of collection		4,847,965.00
Accounts receivable		2,028,019.51
Advances to domestic subsidiaries		7,724,533.31
Advances to foreign subsidiaries		18,751,836.47
Deposits with brokers, less market differences		47,469.99
Market differences in outstanding contracts, net		1,397,800.14
Inventories:		
Cotton, at market	38,141,344.96	
Material and supplies, at cost	163,317.58	38,304,662.54
		$ 87,572,544.68
Other Assets:		
Other receivables, including employees	$ 439,872.67	
Prepaid expenses	94,250.47	534,123.14
Investments:		
Stocks of subsidiaries at book values of respective companies	35,347,387.06	
Non-current advances to domestic subsidiaries	975,000.00	
Other investments	1,241,909.61	37,564,296.67
Fixed Assets, less reserves for depreciation and valuation		278,241.45
		$125,949,205.94

115 Liabilities

Current Liabilities:		
Notes payable, secured	$ 41,515,198 44	
Notes payable, unsecured	2,859,990 21	
Accounts payable and accrued expenses	8,891,748 82	
Dividends paid August 3, 1943	1,307,408 00	
Reserve for Federal income taxes	1,574,534 87	$ 56,148,880 34
Reserves:		
For managers' commissions, contingently payable subsequent to July 31, 1944	945,662 95	
For valuation of investments in subsidiaries	5,000,000 00	5,945,662 95
Long Term Indebtedness:		
4% Debentures, maturing 1951	3,241,400 00	
4% Debentures, maturing 1953	2,693,500 00	
Subordinated to bank indebtedness prior to redemption or maturity:		
4% Debentures, maturing 1979-88	5,481,500 00	
4¼% Debentures, maturing 1989-98	4,939,300 00	16,356,700 00
Capital Stock and Surplus:		
Participating 4% Cumulative preferred Stock, par value $100.00 per share:		
First preferred, 272,411 shares	27,241,100 00	
Second preferred, 54,411 shares	5,444,100 00	
	32,685,200 00	
Common stock, no par value, 84,083 shares	84,083 00	
Surplus, per annexed statement	14,728,679 65	47,497,962 65
		$125,949,205 94

116 Statement of Allocation of Surplus as at July 31, 1943

Surplus per balance sheet			$14,728,679.65
Common stock surplus:			
Balance at July 31, 1942		$5,079,070.03	
Provision for cumulative $5.00 per share and 4% on balance	$623,352.80		
Less adjustment account 665 shares purchased	54,796.84	568,555.96	5,647,625.99
Participating surplus			$9,081,053.66
326,852/660,000 applicable to preferred stocks			$ 4,497,212.96
333,148/660,000 applicable to common stock			4,583,840.70
			$9,081,053.66

Valuation of Stocks

Preferred—326,852 shares outstanding, par value	$32,685,200.00
Participating surplus	4,497,212.96
Total value ($143.76 per share)	$37,182,412.96
Common—84,083 shares outstanding, paid in value	$ 84,083.00
Common stock surplus	5,647,625.99
Participating surplus	4,583,840.70
Total value ($122.68 per share)	$10,315,549.69

On motion by Director Whittington, seconded by Director Johnson, the following resolution was adopted:

RESOLVED, that the balance sheet and statement submitted to this meeting by the Treasurer of the Company be, and the same are hereby approved and adopted as fairly stating the position of the corporation as of July 31, 1943; that the allocation to common stock surplus and participating stock surplus of the total surplus, as shown therein, be, and the same is hereby approved and adopted, and that each holder of common stock be advised by the Secretary of the per share value thereof, as shown by such balance sheet and statement.

The President stated that another purpose of the meeting was to consider authorization of sale of certain of the common stock of the corporation now in the treasury thereof, to certain active officers of the corporation. Following some discussion of the
117 matter, the following resolution was offered, and upon motion duly seconded, was adopted:

RESOLVED, that from the common stock of this corporation now in the treasury, there be sold the following numbers of shares to the following persons, respectively, viz:

2,000 shares to H. Whittington
1,500 shares to W. H. Koar
1,250 shares to Sydnor Oden

1,250 shares to J. M. Johnson
500 shares to W. E. Parry

being an aggregate of 6,500 shares to be sold, such stock not to participate in the dividend this day declared, and to be sold at the price of One Hundred Twelve and 68/100 Dollars ($112.68) per share, being the value per share determined by the balance sheet heretofore adopted at this meeting, less the $10.00 per share dividend declared at this meeting; and

BE IT FURTHER RESOLVED, that in payment for said stock, the corporation accept the notes of the several persons to whom the stock is sold for the full amount of the purchase price thereof, such notes, except as to amounts and numbers of shares, to be in substantially the following form:

$———— Houston, Texas, ————, 19——.

ON DEMAND, I promise to pay to the order of ANDERSON, CLAYTON & Co., (A Delaware Corporation) at its offices in Houston, Texas, the sum of ———— DOLLARS, or in lieu thereof at my option to deliver to them in full satisfaction of this obligation, both principal and unpaid interest, ——— shares of the common stock of Anderson, Clayton & Co., a Delaware corporation. Partial payments hereon may be made at my option and in the event this obligation has been reduced by such payment prior to the maturity hereof, then the remainder of such note may be satisfied by delivery of the proportion of said stock as the amount of principal remaining due is to the said sum of $———.

This note shall bear interest from the date hereof at the rate of four per cent, and such interest shall be payable at the maturity hereof, except that upon the receipt of any dividend upon said common stock, interest accrued to the date such dividend is declared shall become due and payable.

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and one such note to be executed by each of said purchasers severally in favor of the corporation, for the purchase price as set out in this resolution, of the number of shares purchased by him individually, as authorized by this resolution.

118 None of the directors of the corporation who were named in the above resolution voted upon the matter of the adoption thereof.

There being no further business to come before the meeting, the same was, upon motion, duly adjourned.

(S.) D. SUMNERS,
Secretary.

(S.) LAMAR FLEMING, JR.,
President.

Treasury Stock

1932					1932			
		145 shares purchased from Estate of Ed Keene		14500	Dec 31	Sale of Treasury Stock	X45	14500
June 12		7600 Sh Common purchased from Estate of L.L. Blanton	295	2694469	July 5	(WHK - 1000 - V.11.597) Sold 1500 Shs of Treasury Stock	313	155984
				2694469		To Balance		113485
								2694469
July 1		Balance		N3485	May 1935	Sold 100 Sh Treasury Stock (CNBC)	X80	114006
Sept 21		Gain on sale Treasury Stock	21	80521				
				114006				114006
Dec 5		Purchase of 18574 Sh Common Stock	79	94337346	Dec 1935	(WLA) Sold 3035 Shs Comm	X9	15414765
					July 31	To Balance		78922581
				94337346				94337346
1940		Balance		78922581	Dec 27	(WHK) Sold 1000 Shs @ 33½	X6	3362000
Dec 10		Purchase 18 Shs @ 32½	41	58086	1941 July 31	To Balance		79905267
1941								
July 31		To balance at average value 1275 Shs common Stock	142	4286750				
				83267417				33267217
1941		Balance		79905267	1943 Jan 25	Balance of Cost 1000 Shs sold	80	1717000
Nov 30 1942		2776 Sh common Repurchased	40	2776000	July 31	To Balance		8811029
Dec 28		Cost of original Stock Sold 2776 Shs	80	7426312				
				87855129				87855129
1943		Balance		85840120	1943 July 1	Trf to Machine Ledger		91273217
Jan 7		Purch 65 Sh Common	55	526500				
14		300	6	2431700				
June 28		300	97	2474854				
				91273217				91273217

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Surplus

1941						1941					
July 31	To Balance			48 63 22 8	10	July 31	By stock investment in stocks at respective book values as of			26 24 73 6	
							"			22 38 47	56
				48 63 22 8	10					48 63 22 8	10
Dec 30	Adjust Stock appreciation 7/1	4		1 23 75 1	97		Balance			48 63 22 8	10
" 30	Cost over stated value of 22 76 shares Common Stk	4		9 4 2		Dec 31	From Common Stock Surplus	53		44 59 26	6
							Reserves	53		17 70 57	
30	Dft to Common Stk Surplus	4		28 94 6	10	1942					
	Preferred Stk Surplus	4		17 70 57		July 18	Canal No 11/30		80	74 24	
1942						May 31	Overaccrue Fed Inc Tax			3 45	57
July 18	Loss on Sale of Treasury Stk			67		July	appreciation of stock held		131	53 28	51
July 13	adjust Reserve for Exam Cost Treasury Stock Common			57 07	12				132	27 4 86	73
13	Add Cap Stock Sale	10		2 50		1940	Dft from P & L	4	133	17 06	48
31	To Balance			82 22 49	32						
				184 97	54					184 97	54
Dec 16	Increase Fed Inc Tax Accrue	41		5 3			Balance			82 22 49	32
1942	Exam cost purchase of 50 Com Stk	50		5		Dec 1943	Reduce Cap Stk to Par	45		44 37	50
	300			24		July 31	Appreciation in stocks held	126		77 41 16	08
July 18	300	98		24 44 8							
July 31	Add. income tax 1940 adjt	123		90	09	Aug 1	Dft to Machine Ledger			17 16 40	41 04
"	Dividend provided for	125		13 07 40	80						
"	Dft P & L	126		13 64 34	38						
"	Appreciation of J.S.A.	127		20 97 76	95						
"	Cost amortization of 51,815 shs. J.S.A.			9 39 42	58						
				33 47 20	31					33 47 20	31

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PLAINTIFF'S EXHIBIT NO. 8

Surplus

1937						1937			
July 30	Dividends Paid	52		1043218			Balance Forwarded		14316237
31	1st Pfd Div. 8/1/36 7/31/37	95		54803656	July 31		1st Pfd Dividends for 7/31/36	95	15412834646
	2nd	95		46251725			Increased Value of Investments	97	2107543600
	Prov for Contingent Div on 1st Pfd	95		30578500			From P & L	98	14419025
	2nd	95		8807900					
	Accrued Tax Adj Dec-Jan 38-39 310.03	95		3705477					
	To Balance			123652273					
				367558449					367558449
May 31 1938	Exc div 5/31/38 on 167 shares 1st pfd acquired	80		23867	Aug 1 1937		Balance		123652273
July 31	Prov for accrued div on 1st Pfd	110		4754815	July 31 1938		First Pfd Div proposed for 7/31/37	95	15480356
31	" Contingent div on 1st Pfd	110		3400000			Over accrued income tax 3/31/37		13723
31	From P & L	127		2856453			Estimated overaccrual Excess tax	127	1077676
	To Balance			547407366			Transfer from Reserve for Valuation of Investments	170	2000000
				636280192					636280192
Dec 31 1938	Adj Value investments as 7/31/38	64		60575203	Aug 1		Balance		547407366
	Value applicable to preferred stock	65		47076625	July 31		Prov for Cont Div on 1st Pfd	110	18534370
July 31 1939	Cost of investments at book value			64070600	Jan 31 1939		Cum Div	110	4358 66
	Trf to Surplus Allocated to Common	64		32163467			Excess of Book value over Cost of purchase of 10 shs for retirement	64	4
				87330705			From P & L		46446
									87330705
Dec 31 1938	Excess of Cost of Common Stock	5		5670	July 1		Appreciation in investments		
July 31	Trf to Profit & Loss	146		4641222			for year ended 7/31/38	146	2058863
31	Trf to Surplus Allocated to Preferred Stocks	146		3097600			Loss on Sale 3-35 Lone Common Store trf'd to Surplus	146	
31	Trf to Surplus Allocated to Common Stock	146		46197333			allocated to Common Stock		56208570
				54940263					54940263

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Surplus - Allocated to Common Stock

1940									1939										
July		Cat over for yr 15,539 Dr																	
		Treasury Stock					779	596	July	31									
	31	Loss on 3035 Sh Common																	
		sold out of treasury Stock					56	20											
		Do Balance					2841	42	5	02									
							3678	32	0	02									
Dec	40																		
July	41				47			562	86				Balance						
	28				95	X		43	90		1941	28	To 1000 Sh T.S. Comm				95		826	20	00
		Dividend Accrued 7% Pfd			95			70	35	91							95		17	70	00
July	31	re: exchange dif for Comm			111	X		41	59	99	July	3	adj entry				161	X		43	90
		Do Balance					2836	25	75												
							2198	25	192										1891	58	92
																			1835	85	75
Nov		15% Stock dividend 11/12/41			39		1271	220	00		1941		Balance								
Dec	31	Cfr to Surplus			58		44	326	76		Nov	3	Cfr from Surplus				45		2894	661	01
							3720	486	76										730	486	76

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PLAINTIFF'S EXHIBIT NO. 10

ACCOUNT No 1805

PAGE No 1

TREASURY STOCK - COMMON

ORIGINATOR	DATE	VOU NO	EXPLANATION	VAL DATE	DEBIT	CREDIT	BALANCE
			18,723				
OD	AUG 31 43	21-H	18,618 SHARES		912,732.17		912,732.17
2,732.17	DEC 31 43	115C	6500 SHARES SOLD	12-18-43		6,000.00	
			EXCESS OF COST OVER STATED VALUE OF 6500 SHARES SOLD	12-18-43		309,526.16	596,706.01
596,706.01	JAN 31	152D	ADJ. JE. 115-C			14,108.84	582,597.17
						BALANCE TRANSFERRED TO NEW LEDGER	

LEDGER SHEET, BOSTON

ADCO 18

PLAINTIFF'S EXHIBIT NO. 11

ACCOUNT NO 1307

PAGE NO 1

EARNED SURPLUS

OLD BALANCE	DATE	VOU NO	EXPLANATION	VAL DATE	DEBIT	CREDIT	BALANCE
.00	AUG 21 43	9-K	4% ON 1ST & 2ND PARTICIPATING PREFERRED STOCK	8/2 2.0	1,307,408.00		1,307,408.00
07,408.0	AUG 31 43	21-H	TFR DEL.CORPN. TO HOUSTON BOOKS		17,464,041.04		18,771,449.04
18,771,449.04	NOV 30 43	101A	DIVIDEND OF $10.00 PER SHARE ON 84,083 SHS.COM.	11-30-43	840,830.00		
			SURPLUS OF SUBSIDIARY (LA). ACQUIRED IN MERGER	10-1-43		660,271.51	18,952,007.53
18,952,007.53	DEC 31 43	114K	ADJ. RES. FOR MGRS. COMM.			50.01	18,951,957.52
18,951,957.52	[illegible]	152A	X ON JE 9-K			7,408.00	17,644,549.52
17,644,549.52	FEB 29	162D	TFRD FROM A/C 1308			31,154,295.75	13,709,746.23
13,709,746.23	MAR [illegible] 44	192D	ADJ.RES.FOR VAL.COTTON EXCH. MEMBERSHIPS			2,941.86	
			ADJ. RES. FOR VAL. OF INVESTMENTS IN LIQUIDATION			415.00	
			ADJ. RES. FOR VAL.OTHER STOCKS			726.00	13,713,829.09
13,713,829.09	[illegible] 44	201L	CANCEL P.T. OF JE 165-K OF 7-31-41, LOSS ON CAPITAL STOCK OF TERMINAL COMP.&WHSE.CO. ADDED TO COST OF STOCK OF TERMINAL WHSE.CO.		96,073.35		13,617,755.74
13,617,755.74	[illegible] 44	222J	ADD'L INC. TAX YR. 7/31/42		5,730.97		13,612,024.77
13,612,024.77	[illegible] 44	253H	REFUND OF ASSESSMENT INC. TAX 7/31/38			52,444.15	
			1941/42 CR. [illegible],922.80 AT 10.00				
			BRAZIL,TAX [illegible] INTEREST		[illegible]		
			REFUND 1937/42 INDIAN TAX			[illegible].00	
			ADJ. JE 1224 DEAC. [illegible]		[illegible].57		13,[illegible],805.84
13,539,805.84	[illegible] 44	253J	C.E.& A. PRIOR YEAR - [illegible]				
			CITY C/O CO. IN LIQUIDATION			[illegible]	13,539,925.53
13,539,925.53	JUN 30 45	281B	ADDNL.STATE INC TAX YEAR ENDED 7-31-40 SEE.JE 264D		6,593.48		
			ADDNL. STATE INC TAX YEAR ENDED 7-31-41 SEE JE 264D		3,198.35		
			ADDNL. STATE INC TAX YEAR ENDED 7-31-42 SEE JE 264-D		673.04		13,529,460.66
13,529,460.66	JUL 31 44	291B	ADDNL. INCOME & PROFITS TAXES JOINT STOCK ASSN. YEAR ENDED 7-31-40		132,405.47		13,397,055.19
13,397,055.19	JUL 31 44	303F	4% 1ST & 2ND PARTICIPATING PREFERRED STOCK	6/30/40	1,307,408.00		12,089,647.19
12089,647.19	JUL 31 44	314E	REFUND F.I.TAX CALIF.CORPN.F.Y.			59.42	12,089,716.61
89,716.51	JUL 31 44	314M	LONG BEACH MACHINE WORKS PERIOD ENDED 7/31/42.		1,916.79		
			LONG BEACH MACHINE WORKS PERIOD ENDED 7/31/43.			94,13.47	
			LONG BEACH MACHINE WORKS PERIOD ENDED 7/31/44.			1,379.79	12,253,343.04

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[redacted]

ACCOUNT NO 1307

PAGE NO 2

EARNED SURPLUS

OLD BALANCE	DATE	VOU NO	EXPLANATION	VAL DATE	DEBIT	CREDIT	BALANCE
[illegible]3,343.04	Jl 31 44	3140	ADJUSTING RES. FOR VAL. FIXED ASSETS.			2,402.24	12,955,805.28
85,805.28	Jl 31 44	314T	ADJ. RES. VAL. EMPLYS NOTES		36,326.80		
			ADJ. RES. VAL. FOREIGN ACCTS.		9,354.65		12,910,123.83
10,123.83	Jl 31 44	314U	PROVISIONAL ADD'L. INCOME TAX 7/31/42		51,832.22		
			PROVISIONAL ADD'L. INCOME TAX 7/31/43		3,120.04		
			INCOME TAX LA CORP'N. 9/30/43		455.92		
			ADJ. RES. FOR MGRS. COMMISSIONS		117,315.32		
			ADJ. PROFITS LRM WKS 7/31/43		301,855.17		
			ADJ. PROFITS LRM WKS. 7/31/44		261,327.75		
			RESTORE PART RES. FOR VAL. STKS. OF SUBS. [illegible]			910,425.96	
			RESERVE FOR EMPLOYEES RETIREMENT		2,001,347.00		
11,083,296.37	Jl 31 44	314U	APPRECIATION OF STOCKS IN SUBSIDIARIES			3,260,685.37	14,343,981.74
14,343,981.74	Jl 31 44	314U	ADJ. RES. FOR OTHER STOCKS			525.11	
			ADJ. RES. FOR EMPLYS NOTES			15,750.00	14,360,256.85
14,360,256.85	Jl 31 44	314V	EARNINGS 7/31/44			2,667,915.77	17,028,172.62

BALANCE TRANSFERRED TO NEW LEDGER

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PLAINTIFF'S EXHIBIT NO. 12

ACCOUNT NO 1506

PAGE NO 3

CAPITAL SURPLUS

OLD BALANCE	DATE	NO.	EXPLANATION	VAL. DATE	DEBIT	CREDIT	BALANCE
.00	DEC 31 43	115C	ACCT. 6500 SHS.COMMON TREASURY STOCK SOLD	12-18-43		725,920.00	725,920.00
25,920.00	MAR 31 44	192D	RES FOR VAL.EMPLOYEES NOTES		720,420.00		5,500.00
5,500.00	JUL 31 44	314U	TO RES. FOR EMPLYS. NOTES		5,500.00		.00

127 SUPREME COURT OF THE UNITED STATES—October Term, 1954

No. 504

UNITED STATES, PETITIONER

vs.

ANDERSON, CLAYTON & CO.

ORDER ALLOWING CERTIORARI. Filed February 7, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Claims Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 [illegible] 1144